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Transcript from Professionalism Conference

TRANSCRIPT*

FIRST PANEL: The Law Schools' Response to Professionalism Issues
Presenters: Sammons and Alfieri
Responders: Crystal, Carter, Warren, and Heil

JACK L. SAMMONS, Griffin B. Bell Professor of Law, Mercer Law School.[1]

Law School Efforts to Enhance Professionalism

It occurred to me, after listening to this morning's speakers, that a transition is needed before I begin my presentation. So here it is. When my daughter was fourteen or so we caught her doing something she should not have been doing. During our conversations about this she asked, as I am sure your children have asked of you at some point, "Why shouldn't I lie?" If she had been listening this morning the answer she would have heard is: "Because you will be punished." The answer my wife and I gave her, however, and the answer you have given your children is: "Because you would be a liar." You give this answer, and you then hope that your child has been raised in such a way that it is persuasive.

My understanding of professionalism is that it is concerned with the latter response to unethical conduct. There is no doubt that the errant members of our profession, of which there are many, are very much in need of punishment, and I applaud the efforts of those who bring them in line. Professionalism, however, is about a different way of understanding and of motivating ethical conduct within a profession. The ethical motivation of legal professionalism is the desire to be a good lawyer and the internal reward that comes from being one. And now for what I was prepared to say.

I would like to start with a story, well known in certain circles, about one of my intellectual mentors, Stan Hauerwas, a theologian at Duke Divinity School. It is important to the story to know that Stan is a Texas theologian, but not a George Bush "Why Don't We All Just Get Along" Texas Nice Guy. As a theologian, he is more of a John Wayne straight shooter. And, as with Wayne, he is charming enough to get away with it.

Stan was walking across the Quad at Notre Dame one morning when he spotted some friends, a married couple, both Jewish, walking nearby and joined them. Knowing that they had a son about to be of age he asked, "When is the Bar Mitzvah?" The couple replied, "Well, we are not sure. We want Jacob to

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* This Transcript was edited by editors of the *South Carolina Law Review*, as well as the presenters and responders who participated in the Conference on Professionalism held in Savannah, Georgia on October 20-21, 2000. The unabridged transcript from the conference is on file with the *South Carolina Law Review*.

1. My thanks to Brad Wendel, Tony Alfieri, and Roy Stuckey for their thoughts on this presentation.

decide for himself that he wants to be Bar Mitzvah'd. He hasn't decided yet." Stan retorted, "So, there have been 5750 years of Jewish history, Jewish suffering, *so that this twelve year-old can make up his mind*? Could he have a mind worth making up if he does not know his parents stand for something?" As I said, Stan can get away with comments like this. And not only get away, but succeed. Jacob had his Bar Mitzvah.

If after 2600 years or so of lawyering, dating, as I see it, from the pre-Socratics, and if after my own almost thirty years in the practice of law and almost twenty-five years of teaching legal ethics, I had nothing more to say to my students than "it is up to you to make up your own mind about what good lawyering requires of you," something, I think along with Stan, would be very wrong.

Why do I tell you this story? Why do I make this point? Because it explains why I have eliminated from my presentation today all of those developments in law school courses and curricula that have increasing student self-reflection as their explicit goal so that students will see that the ethics of our practice are a matter of their own personal choice. I do not think these developments, as interesting as some may be, have much to do with professionalism. In the simplest of terms, there is surely nothing wrong with encouraging people to stop and think about what they are doing, and this is what most of these developments claim to be doing, but, I would suggest, *what* the students think, when they stop and think, matters greatly if the goal is increased professionalism.[2] Rather than courses teaching self-reflection and personal choice, I looked instead for courses based, at least in part, on the authority of the tradition of the practice we are in together, the authority of that ongoing conversation that the practice has had about itself over time in which each generation of lawyers comes to know what it means to be a good lawyer. This form of authority is, of course, definitional of the term "professionalism."[3]

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2. I did not put too fine a point on this in the talk, but, to be sure, I want to add now that I am always puzzled how professionalism, which by definition must involve some recognition of the moral authority of a profession, is improved by asking twenty-somethings to choose what good lawyering requires based on the values they bring with them to law school, values that are, of necessity, inadequate to the task. It would be like going to a four-year conservatory and not expecting your musical judgment to change for the better (in the only way in which we can understand what "better" might be). Yet, you find exactly that argument made over and over again in the literature on teaching legal ethics.

3. It is very easy for legal ethicists, self-selected as they are for concern for others, to fall into the trap of thinking that respect for autonomy and for the opinions of others requires an avoidance of all authority in the legal ethics course, including the authority I have described in this talk. This trap is made even more inviting when legal ethics is taught through moral dilemmas. But is this avoidance respectful of others in any true understanding of that virtue? Oh, I know, anything other than just leaving the resolution of ethical issues up to the students can certainly come across as authoritarian, and I have a long list of my own gaucheries in trying to avoid that, but the authority offered in the kind of teaching I am suggesting here, and the kind of parenting Stan suggested in the story with which I began this talk, is not the teacher's or parent's authority. Instead, it is the authority of the tradition of the practice the students are entering, and it is reflected in the particular forms taken by our self-critical conversations within the practice. At

In preparing for today, I looked for pedagogical developments that would tend towards an initiation of law students into the tradition of our practice, *e.g.*, courses teaching the history of the practice and placing it within the rhetorical tradition so that we know the story of which we are a part; courses carefully exploring the rhetorical culture and language our practice maintains and exactly what is required of us to maintain it; courses carefully explicating the social goods carried by this rhetorical culture, most specifically the good of the legal conversation itself, including the good of opposing voices being heard and being heard equally; courses developing the particular character required for excellence within our practice and the virtues, especially the virtue of practical wisdom and the intellectual virtues of recognizing opposing arguments, and moral affirmation in the face of the contingency and complexity that our practice demands of its practitioners.

I looked especially for developments that would aid our initiates in seeing our mutual dependence as lawyers in the ongoing project for which we are professionally responsible. In a nutshell, I looked primarily for courses that would help students appreciate the common goods of lawyering, the good upon which all conceptions of professionalism and legal ethics depend at rock bottom for their coherency.

What did I find? Truthfully now, since I am a lawyer? Not much. Surely not enough. There are some schools taking more seriously through orientation programs, the idea that our students are being initiated into a common project with a very long tradition through orientation programs, often with the assistance of the bar. You can also find an occasional required first-year course on the legal profession. There are also some new programs, such as the one at South Carolina that brings us together today, which seek to do more in this regard, or older programs—the Intergenerational Legal Ethics Project at the University of North Carolina, for example, in which oral histories are used to much the same effect. But these are rare, and, to my knowledge, there is no law school that takes appreciation of the common goods of lawyering seriously as a three-year pedagogical project except in extremely amorphous ways.

On a much more positive note, however, there has been one central motif to certain developments in teaching legal ethics over the past ten years that is terribly important and can be made to serve the development of professionalism as I have described it. This conception of professionalism emphasizes, as I did a moment ago, the virtue of *phronesis* or practical wisdom. Practical wisdom, in turn, requires, as Iris Murdoch has taught us, a moral vision, a truthfulness really, about the situations we are in as

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least for me, the authority of the tradition of practice is similar to the authority the common law method has over our students and over our teaching in their first-year courses and is no more authoritarian than that authority is. In simplest terms, the tradition of the practice of law offers a way of thinking about the ethical issues within the practice of law, just as the tradition of the common law offers a way of thinking about legal disputes. Wouldn't it be surprising if this were not true? And shouldn't we be teaching this?

lawyers—especially a truthfulness about their complexity. For students to learn to be truthful about the situations we are in as lawyers they must first be placed in truthful lawyering situations, and this is what has been happening in legal education over the past ten years.

This is a very widespread development, one I think best described as the *contextualization* of the teaching of legal ethics. Now contextualization is certainly not a panacea. Like the goal of self-reflection, it can serve many ends and can be for better or for worse. Contextualization is often justified by the professors using it as a means towards improved self-reflection and student choice because, I think, good philosophical liberals that the professors are, they are not sure what else would pass muster as a justification. I think, however, that contextualization has an inherent tendency to move students in the direction of professionalization, although I certainly will not attempt to defend that proposition this morning. I think that contextualization tends towards professionalism whether the professor is using it for that purpose or not.

Contextualization has taken very many forms: starting early on in the contextualization of the classroom discussions of the basic legal ethics course with the use of the problem method, supplemented routinely now, thanks to Professor Steve Gillers and many others, with videos and other ways of offering more complete narratives of the problems studied. The use of the problem method was followed by the organization of problems in particular substantive areas of practice as in Professor Nathan Crystal's text, classroom simulations such as those done by Professor Robert Burns at Northwestern or the Profession of Law course at Columbia, the increasing use of practicing attorneys in classroom discussion of problems, and, with all this, the concomitant shift of focus in the course from ethical regulations to the broad panoply of regulations, rules, constitutive rules of the practice, and customs governing a lawyer's conduct and from simplistic rule compliance to complex matters of professional judgment.

Beyond these changes in the basic course, several schools have developed course progressions from basic to advanced legal ethics courses exploring very particularized practice contexts. The work of Professors Bruce Green, Mary Daley, and Russ Pierce at Fordham is the best known model of this, but there are others, for example, the specialized ethics offering at the University of Texas and Duke University. Another contextualization approach is to teach legal ethics through clinical or skills offerings. The clinic, of course, has been the home of a truer form of professionalization for a long time, but now this is being done in a much more conscious and rigorous fashion in programs such as Professor Jim Moliterno's at William and Mary or the clinical legal ethics classes at Notre Dame or the Ethics/Lawyering Skills offerings at Loyola.

A few schools have developed a sequence of skill-based offerings, focusing on a particular role of the attorney, in which the sequence is designed to produce a progression towards a professional conception of the role. The best example I found of this is the fledgling Moore Advocates Program at Fordham now growing its feathers under the good direction of Professor Ian

Weinstein. But perhaps the most common of contextualization methods is teaching ethics through what is called the pervasive method, in which legal ethics are integrated into existing substantive offerings in one fashion or another. Our own Professor Deborah Rhode is one of the champions of this approach, and the success of the effort is indicated by the fact that the schools attempting some form of the pervasive method are far too numerous for me to mention this morning.

There are also a few schools in which contextualization, as a foundation of teaching towards the profession, occupies a much more central role in the overall design of the curriculum. My own school, Mercer Law School, I am pleased to say, has been a leader in this effort, with a curriculum designed backwards, that is, starting from an agreed upon conception of the professional lawyer we wanted to produce.

I hope that this motif of contextualization spreads, and I think it might. I hope we can see, in what I have described so briefly today, a beginning tendency or, at least, the hint of a beginning tendency to move concerns with professionalism from the periphery of pedagogical decision-making toward the center from which they came and to which they belong.

Some of the developments I have described, in fact, all of those that extend beyond the ordinary course offerings, are extremely difficult to accomplish. This is not news to the academics in the audience. More than half of the ones I mentioned came about through the prompting of outside monies, primarily the Keck Foundation. This will come as no surprise if you are at all familiar with the politics of curriculum reform. Without outside sources, curricula changes are always battles for limited resources. Because such battles can be personal, fierce, and unpleasant, and because there is a tacit agreement among law professors not to rock the boat too much since we are all floating very high in the water these days, the kind of structured curriculum, progression of courses, increased requirements, and sectionalization that professionalization requires are damn near impossible to achieve. Add to this the disastrous notion, encouraged by some hiring partners who are very confused about the requirements of good lawyering, that law students should begin specialization while in law school, and you can see the enormity of the problem facing any proposal for change.

One way of avoiding the problem, however, is to establish programs outside of the ordinary curriculum, and as I have said, to do so with outside monies. There are now, thank goodness, a rather large number of these outside programs—we recently created one at Mercer under the direction of Professor Pat Longan—and Professor Tony Alfieri of the University of Miami will now tell you about professionalism developments within them.

ANTHONY ALFIERI, Professor and Director of the Center for Ethics and Public Service, University of Miami School of Law:

Activities of Law School Centers on Professionalism

Thank you, Jack. Let me address three points on the subject of law school-based professionalism centers: first, the nature of their activities; second, the impediments to their growth; and third, the extent of their impact. Both educational and aspirational in their mission, professionalism centers serve multiple constituencies: traditionally students, the bar and bench, and alumni. Descriptively, their activities encompass colloquia, scholarship, curriculum development, and community service.

In the field of colloquia and scholarship, Fordham Law School's Stein Center sets the pace. Led by Professors Bruce Green, Mary Daly, and Russell Pearce, the Stein Center conferences have ignited a burst of energy in the ethics literature. Programs at Hofstra, Harvard, Stetson, Cardozo, and here at South Carolina add to this energy. Much of the early literature is surveyed in the fine bibliography compiled by Stanford Law School's Deborah Rhode. However noteworthy, the more recent literature lacks thoroughgoing accounts of the function of race, ethnicity, gender, and sexual orientation in ethics and the lawyering process.

In the field of pedagogy, many increasingly heed Deborah Rhode's call for the integration of ethics materials across the curriculum in both substantive and skills courses. Fordham faculty have enhanced this curricula diversity by fashioning advanced ethics courses in private and public law areas. Against this background, the absence of a similar jurisprudential integration into ethics courses seems inexplicable, especially given the import of feminist, Critical Race, LatCrit, and Queer theory to legal practice. For those interested in ethics integration outside of jurisprudence, Cornell's Legal Information Institute provides an invaluable resource for academics, students, and practitioners.

In the field of community service, both Fordham's Stein Center and the University of Miami's Center for Ethics & Public Service are developing hybrid models that integrate teaching, interdisciplinary research, and pro bono outreach. Founded in 1996, Miami's Ethics Center is an interdisciplinary project devoted to the values of ethical judgment, professional responsibility, and public service in law and society. The Ethics Center provides training in ethics and professional values to law school and university students as well as to the Florida business, civic, education, and legal communities. It observes three guiding principles in serving the cause of ethics, professional values, and public service: interdisciplinary collaboration, public-private partnership, and student mentoring and leadership training.

Staffed by more than 50 first, second, and third year law students serving as fellows and interns for up to fifteen hours per week, the Ethics Center operates five practice groups in the fields of ethics education, professional training, and community service. The Bar & Bench Group offers continuing

legal education training to Florida bar associations and nonprofit advocacy organizations. The Education Group teaches ethics to faculty and students in Miami-Dade County public and private high schools in weekly seminars and in periodic study circles. The Workshop & Symposium Group sponsors interdisciplinary seminars on the professions at the Law School and University. The University Group supervises a leadership seminar series at the Law School, sponsors an undergraduate ethics colloquium, and co-teaches a first year ethics seminar at the University. The Pro Bono Group administers the Community Health Rights Education Project, an integrated teaching, research, and community service program providing health rights education to underserved communities in cooperation with the Schools of Medicine and Nursing, and the Community Economic Development and Design Project, a community-based education and technical assistance program furnishing small business counseling, economic development training, and economic justice research to residents of low-income neighborhoods in collaboration with the School of Architecture.

Despite their record of achievements, law school professionalism centers confront serious impediments to their future growth and success. The greatest impediment is, of course, funding. In lieu of a law school-supplied operating budget, professionalism centers must pursue both hard and soft money fundraising strategies. Fordham and South Carolina offer instructive lessons in accumulating hard-money endowments. Miami affords a lesson in the travails of mixed strategies: annual giving, donor gifts, foundation grants, and capital campaigns. Mixed strategies require delicate maneuvering inside the law school and university among administrators, faculty, and alumni, and outside among members of the bar and bench, donors, foundations, and corporations. For those pursuing mixed strategies, the best approaches emphasize cross-disciplinary collaborations within the university and joint venture partnerships without.

Impediments common to both soft and hard money fundraising strategies stem from a culture of skepticism that oftentimes infects the media and foundations. To gain appreciation and support for their work, professionalism centers must educate the media locally, regionally, and nationally. Good media relations are an acquired skill that must be cultivated personally and professionally through networking by telephone, e-mail, mailings, and planned events. The same holds true for foundations. Cultivating foundations by regularly circulating annual reports, corresponding with in-house contacts, and visiting national offices for informational briefings on priorities and funding cycles promises constructive results for law schools at all ranks. Outreach of this kind, though strategic, also constitutes an important community-building exercise gratifying in itself.

Overcoming the challenges of financial underwriting, media outreach, foundation support, and institutional politics in building a professionalism center is often daunting and always exhausting. At the same time, the rewards of educating law school and university students, collaborating with university

administrators and colleagues in cross-disciplinary joint ventures, and forging public private partnerships in organizing innovative forms of community service are substantial and inspiring. In five short years, for example, Miami's Center for Ethics & Public Service has helped to educate over three thousand members of the Florida bar and bench, Law School, University, and civic communities. Many other Centers represented here have accomplished equally important objectives. We urge you and your law school to join this hopeful movement in legal education. Thank you.

NATHAN CRYSTAL, Professor, University of South Carolina School of Law:

I know other people have things to say, and I am sure members of the audience have questions they want to ask, so I will limit my remarks to three sentences, not including this first sentence. First, the professionalism movement has been a major topic in the profession for at least ten years. Second, the *New York Times* of August 17, 2000, reported a dramatic decline in the number of pro bono hours by major national law firms; the top firm declined from 220 hours to 105 hours. Third, if the professionalism movement ignores market forces, it is doomed to be irrelevant.

RICHARD E. CARTER, Executive Director, ALI-ABA Committee on CLE, and former Director, ABA Division for Professional Education:

Although I am tempted to take Roy's admonition that one need not make any response, I would like to make a couple of observations. One is just to say how overwhelmed I am at the number of offerings and the different things going on in law schools. As someone who is a law school graduate pre-Watergate, this is a phenomenal change. The only activity that I can remember in my three years of law school was an intervention by the faculty shortly after graduation—an intervention in the admissions process when one of the members of my class was about to be turned down by a lawyer who was part of the mandatory interview process for admission because this graduate had a beard. That was the most we dealt within the issues of ethics and professionalism. I suppose this is in keeping with the topic someone mentioned this morning about outlandish dressing in the courtroom. This is another example of professionalism rather than ethics.

Just a couple of observations that are really questions. I am not sure I heard Professor Alfieri correctly when he talked about what was happening in the clinical area. There seemed to be a greater diversion from using ethics in the clinical setting. It has always seemed to me to be one of the best settings in which to work with students on ethical problems. So I hope I heard that wrong. I have one other observation with regard to Professor Sammon's mention of the pervasive technique. You do not know how lucky you are to make a decision about what you are going to cover and how you are going to cover it based on

your educational needs rather than on some regulation that says you must separate out ethics for one hour or whatever, which is the reality of the world in continuing legal education.

ALFIERI: I will respond to the good question on clinics. I am speaking as a former clinical teacher or perhaps a current clinical teacher, given the hybrid nature of the Center for Ethics and Public Service. The clinical movement and individual clinical teachers are running nonprofit shops, for the most part, and are busy at it. The focus on ethics tends to be secondary to the primary matter at hand, direct services and law reform activities, whether it is in a clinical setting or legal service/legal aid setting or a public interest nonprofit advocacy setting. One of the questions that should be on *our* agenda is how to conduct in a collaborative way some form of empirical and anecdotal studies to get a sense of what is going on in the teaching of ethics, legal aid and services offices, and in nonprofit and public interest law firms whether they be great or small. To the extent that there is an absence of well-developed ethics and professionalism programs, this is a wonderful opportunity to develop innovative programs.

THE HONORABLE ROGER K. WARREN—President, National Center for State Courts

Let me stir the pot a minute—I have not heard anyone address the underlying issue: Exactly what problems and conduct on the part of lawyers are all these efforts trying to address? I would like to follow up on Martha Barnett's comments last evening.

Martha Barnett talked about the need for an outside, public perspective on this issue and the need to build and improve public respect for lawyers and the justice system. I am president of the National Center for State Courts. Our mission is to improve court performance and improve public trust in the courts and the justice system. Therefore, I, in effect, represent an outside perspective. I have not toiled in the field of lawyer professionalism. The fact of the matter is that the public does not distinguish between various elements of the justice system. First, it does not distinguish between lawyers and other institutions and actors in the justice system. Second, public distrust of lawyers is much, much greater than that of any other element of the justice system. Third, and more importantly I think, public attitudes about lawyers are one of the two or three significant drivers of public attitudes about the justice system. It is their attitudes about lawyers, more so than most other factors, that account for their overall view of the justice system. That is, public distrust of lawyers is critical in looking at the issue of public trust in the overall justice system. So much so, as a matter of fact, that the National Action Plan to Improve Public Trust and Confidence in the Justice System, which the National Center for State Courts published last year as the result of a national conference co-chaired by Chief Justice Tom Zlaket from Arizona, identified re-examination of the role of

lawyers as one of the highest priority activities that had to be pursued at a national level to address the issue of public trust and confidence in the justice system.

Now, to take this matter a step further, I think it is important to examine what the public *does* think about lawyers. What are the sources of the public's dissatisfaction with lawyers? The sources of dissatisfaction with lawyers fall into four categories. The first is what I would call commercialism. The public thinks lawyers are greedy, that they are more interested in wealth than other values, that they make too much money, that they charge too much, and that the cost of legal services is the principal reason that courts are unaffordable to the vast bulk of the American public. Secondly, they feel that there is a culture of self-promotion. The public thinks that lawyers typically promote their own personal interest above the interest of their clients and of the public. Thirdly, the public thinks lawyers are unethical—not judged by some standard of *legal* ethics, I am talking about real ethics—that lawyers are dishonest, deceitful, manipulative, and uncaring. In a 1993 survey by Peter Hart for the ABA, the ethical standards of lawyers were compared by the public with the ethical standards of automobile mechanics. Finally, what I would call the fourth category, the sins committed in the name of zealous representation. This is the imperative to "win at any cost." In my view, it is not so much what happens in the courtroom, or in depositions, which is like the tip of the iceberg—one percent—it is what happens in the transactions. It is the idea that to win, someone has to lose. It is the idea that it is a zero sum game. It is paying too little attention to the whole philosophy of win-win. It is that winning means subduing the opponent rather than resolving the dispute or solving the underlying problem.

I am not saying that other issues are unimportant: issues of legal ethics, lawyer discipline, civility among lawyers, and competence. I am not saying those issues are unimportant, but I think the issues that I previously described, the issues that matter most to the American public, are paramount issues, and that the real question is: What can law schools do to address these important public issues?

Service is the criterion that distinguishes lawyers as a profession. But for the concept of service, whether it is to a client, the public, or the body politic as Martha Barnett put it, lawyers are not a profession. They are merely an occupation or a business. The fundamental challenge facing lawyers and law schools, in designing professionalism programs, is how to address the public concern that lawyers are more bound by a pecuniary ethic and one of self-promotion, than an ethic of care, an ethic of service. I think that is the fundamental issue that professionalism programs in law schools are going to have to address if they are going to address the issue of professionalism in the bar in a way that responds to public cynicism about our justice system.

CAROLINE R. HEIL, Editor in Chief, South Carolina Law Review, USC School of Law:

Just to follow up on the clinical idea of the education of ethics, and from a student's perspective, I think one thing lawyers forget when they have been out of law school for a while is that students do understand and seek guidance and want, when we enter a professional responsibility class, to be told what we can and cannot do. It is very frustrating when you read the Model Rules of Professional Conduct to learn that they are very malleable, and you cannot get any guidance on exactly how you are supposed to behave. In addition, I think it is important for us to focus on what students fear when they leave law school and enter the profession. I think we fear three things. These are things that we discuss and actually talk about in law school.

The first fear is becoming the lawyers that we do not respect. No one in law school expects to become an unethical or unprofessional lawyer. I think we all fear the possibility of that happening without ever realizing it and without being able to control it. On that note, the second fear is losing a job because we do not know that we are doing something wrong. The third fear is not having the strength to report people we work under and whom we are taught to respect and depend on. For this reason, I think we need a top-down approach to ethics. We need to fix the legal profession to the degree that we feel comfortable reporting each other and holding ourselves to a higher standard, so that students who move into the profession are not afraid to be as professional and responsible as they can possibly be. Therefore, from a student's perspective, I want to remind you that even with clinical programs and centers and all of the things we are discussing today, the bottom line is: You can "teach" professionalism all day long, but students already understand it. We know. I think most of us are good people and we know right from wrong. Instead, we need the *tools* to be the people you are "teaching" us to be.

Thank you.

SECOND PANEL: The Judiciary's Response to Professionalism Issues
Presenters: Zlaket and Ramsey
Responders: Atkinson, Grey, Morrison, and Diminich

CHIEF JUSTICE THOMAS A. ZLAKET, Supreme Court of Arizona:

The Conference of Chief Justices' 1997 National Action Plan on Lawyer Conduct and Professionalism

Thank you very much and good morning. I am honored to be with you. I would really like to talk about the subject you just introduced, but the program says I am supposed to tell you about the Conference of Chief Justices' National Action Plan on Lawyer Conduct and Professionalism. Before I do, I would be remiss if I did not echo all the comments of my good friend, Judge Roger

Warren. He said it about as good as it can be said. If this profession does not wake up pretty soon—this profession that I love and have been a member of for so long—if this profession does not wake up to what the public perceives of it, then I believe we are heading down the road to obsolescence and irrelevance. We will talk more about that this afternoon.

In January of 1999, the Conference of Chief Justices adopted what is now titled the *National Action Plan on Lawyer Conduct and Professionalism*. In ten minutes I cannot tell you much about that National Action Plan, but it is available to you. In your material, you have a website—an address that is the National Center for State Courts' website, and the National Action Plan is published on that website. Let me just read briefly from the Executive Summary of the National Action Plan. It says, "In response to concerns about a perceived decline in lawyer professionalism and its effect on public confidence in the legal profession and the justice system, the Conference of Chief Justices (CCJ) adopted Resolution VII at its 1996 Annual Meeting."[4] The Executive Summary then goes on to talk about what the Conference did in commissioning various surveys and survey groups of people from all over the country, from law schools, courts, and to some extent, from the public. Then the Conference got together a select committee and put together this National Action Plan which consists of three sections. Section one contains a detailed description of the institutional and individual responsibilities of the bench, the bar, and the law schools in promoting lawyer ethics and professionalism. Section two contains the specific recommendations of the National Action Plan. The recommendations are set forth in familiar black letter and commentary format, and they address seven specific topics of lawyer ethics and professionalism: first, professionalism, leadership, and coordination; second, improving lawyer competence; third, law school education and bar admission procedures; fourth, effective lawyer regulation; fifth, public outreach efforts; sixth, lawyer professionalism in court; and finally, interstate cooperation.

When you look at the National Action Plan several things become immediately obvious. First, the primary message of the Plan is that leadership in the area of professionalism must come from the top. It has to be a top-down effort. It cannot come the other way, and it *will not* come the other way as experience has taught us. So, it must come from Chief Justices; it must come from law school deans; it must come from leaders of the bar. Secondly, there must be a coordinated mechanism of some kind. The Plan calls for a professionalism commission in each state. There must be some central body that institutionalizes this effort to enhance, improve, maintain, and nurture professionalism. This must be a permanent body, not just a temporary group that gets together to publish another report that sits on the shelf and collects dust like so many reports that we already have. It must be an institution that is designed to perpetuate professionalism in the bench and bar. Finally, it requires

4. *See* A.B.A. CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 49, *available at* http://www.ccj.ncsc.dni.us.natlplan.htm.

the coordinated and committed effort of the bench, the bar, and the academy. There is no way that we are going to improve professionalism without a coordinated commitment from all three. When you look at the Plan you see things that are not so new. Some are already in place. The Plan covers things like education for lawyers and judges, mandated professionalism courses, ethics courses, and providing innovative and cost-effective CLE programs for lawyers. It talks about providing a MAP (members assistance program) for attorneys in each state; providing LOMAP (law office management assistance programs) for attorneys; giving ethics advice with hotlines and advisory opinions; and mentoring. In terms of law schools, it talks about curriculum, bar exams, character and fitness examinations, and responsibilities. It goes into lawyer regulation both in and out of the courtroom. Finally, it talks about public outreach and education, things that you and I have spoken about over and over and over again.

My problem is that I see a profession in denial—a profession that simply will not acknowledge the problems that it presently faces. Our keynote speaker this morning talked about the marvelous capacity for self-delusion that we see among lawyers. We see it as well among judges. The title of this section is the "Response of the Judiciary." I am here to tell you that it is not good. Judges have done a generally inadequate job in the area of professionalism. Judges are a very difficult bunch. I am a new judge. I have only been on the bench eight and a half years and that follows twenty-seven years of private law practice. What I see in judges is one of three different qualities, and sometimes I see all three combined in the same judge. First, there is either apathy or a misguided sense of being uninvolved in problems of the legal profession. I recall a predecessor of mine on the Arizona Supreme Court who once boasted, "When I put this black robe on, I stopped being a lawyer." I wanted to say, "I know, I've read your opinions." There are far too many judges on the bench today who stop being lawyers and stop being involved in the profession from which they came when they put that black robe on, who never again care about the profession. They will not enter the fray; they simply do not want to be bothered, do not want to be involved.

Second, there is the judge who is extra cautious. He says, "Gee, I would like to get involved but the Code of Judicial Conduct prohibits me from doing so." I think those judges use the Code of Judicial Conduct as a cop-out, as something to hide behind. I think they are not willing to step out and be leaders, be aggressive in taking care of this very fragile justice system that we have. Finally, there are those judges who are simply scared. They were alluded to early this morning. Judges who are afraid of the political power of those lawyers they rely on to get elected or to be retained; judges who are worried about judicial performance review polls; judges who are worried more about keeping their jobs than doing their jobs. Finally, we do have limitations on resources and limitations on time that impact all of our judges.

I am going to sit down because I have used my ten minutes. Unless and until judges step up to the plate, unless and until judges get involved in the fray, unless and until judges are willing to control the conduct of lawyers more

than they have in the past and get involved in public education efforts so that the people out there that we are supposed to be serving know who we are and what we do, unless all of that takes place, I think these conferences, while they are very nice and I enjoy them, are a waste of time. I think judges need to get off their rear ends and get out into their communities; they need to get involved in the day-to-day activities of lawyers and the justice system that they are supposed to be serving. Until that happens, we will have a very difficult time.

Thank you.

JUDGE HENRY RAMSEY, JR. (Retired), former Dean, Howard University School of Law, former Chair, ABA Section of Legal Education and Admissions to the Bar, and former Judge, Superior Court of California:

Judicial Training About Professionalism

With respect to a judicial training response to this problem, I have a few suggestions as to what that response should be. Not in terms of specific content, but in terms of what the issues are. This is very much another one of those "Why are we here?" questions. At one level it is incredibly complex and at another it is fairly simple. The simple part is what we need to do. The complex part is trying to get judges to do it. What the judges need to do is act professional within their courtrooms. They need to start their matters when scheduled. They need to complete them when scheduled. They need to make fair and honest rulings that are understood and explainable. They need to just behave in a competent way. I cannot go into too much detail because of time constraints. But they basically need to act professional in carrying out their duties because that sends a signal to the lawyers as to what sorts of behaviors are acceptable and what sorts of behaviors are appropriate. They also need to enforce the ethical standards with respect to behavior inside and outside of the courtroom. When I say behavior outside of the courtroom, I mean behavior that people engage in when putting together transactions and conducting depositions and that sort of thing. Judges need to be made more aware of how important that is. Now, how do we get judges to do this?

One suggestion starts where most law schools start—within the profession. In this country, judges come from the lawyer ranks. Therefore, the training of what is appropriate professional conduct should clearly begin at that level. Obviously, we have judicial canons. We have judicial college courses. We have seminars and workshops at the annual meetings, and we also have, and need to have, mentor judges when a person is appointed to the bench. I am primarily concerned about trial judges because it is trial judges that interact with most lawyers and indeed interact with most members of the public who have contact with the courts. Mentor judges are more experienced judges who have a real important effect upon a new judge who is appointed to the bench and needs guidance and leadership as to the professionalism that is expected. The big issue for me is that judges need to be trained not so much about legal ethics because that is fairly simple. Do not lie, do not cheat, do not steal, and

do your work in a competent manner. If you stick within those constraints, chances are you are going to be okay. Judges need to be trained to see themselves as part of an institution called a court. The court plays a particular role in our society, and if my court, not my courtroom, not me, not a guy in a dress, but the court of that institution that provides a certain public service is not functioning properly, is not functioning professionally, then I and we are not doing our jobs. Too few of our judges see themselves as representatives of, responsible for, or a part of this institution called a court. Because of our electoral process or even more so with our appointment process, where people have life tenure, we do not see ourselves as responsible for the whole, instead we see ourselves as responsible for me. That failure to see oneself as a part of this very important institution in American life and American government is where the training needs to be focused. I think if we can get judges to appreciate and see that responsibility and that role, we will have fewer problems teaching them to do their jobs in a competent, professional manner, which will lead to an increase in the professionalism of the judicial system.

Thank you.

ROB ATKINSON, Professor, Florida State University College of Law:

I am a law professor, have been a lawyer, and I will probably never be a judge, so I am not campaigning here. I want to take some issue with Justice Zlaket's notion that judges and justices have done a sort of lousy job. My experience with judges has been mostly through their professionalism commissions. I think the Georgia Supreme Court has done an especially amazing job in bringing what were once warring factions together around a round table. When I first started working with professionalism issues, fourteen years ago, judges would come to me and say, "If you law schools would train lawyers to be civil and otherwise professional, and if you lawyers would just do what they say, things would go better." People from the bar would say to me, "If the judges would control their courtrooms, and you law schools would train law students to be better folks, then there would be no problem." Then we academians would say, "We can teach the law, but the rest is up to y'all."

Largely through efforts like this conference, that kind of finger pointing has taken a back seat to coming together in a dialogue. I think one of the most important ways that has happened is kind of oddly straightforward. This comes close to something Dean Elliott said. In the place of lectures where people are told about the good old days and pointed to examples of great eminences of the past, the Georgia Supreme Court has put together a really great series of videos. Sitting here in front of Steve Gillers, I would have to say, the quality of acting is not up to Steve Gillers's video series, but then there are fewer unemployed actors in the Georgia Bar than the environs of New York University. But the videos are very good. What they do is pose dilemmas in the form of real life situations and are designed for audiences of lawyers, law academics, law students, and judges. They encourage you to talk about what

the problem is. They do not give pat answers. They present really hard cases for us to talk about. To me, that is what the judicial side of the legal profession has done much better than either of the other two sides—the bar or legal academia. Along the same lines, I think the real challenge to the kind of commissions that Justice Zlaket has talked about is to keep the dialogue up and not to let it degenerate into it what he properly described as inappropriate window dressing or what Dean Elliott identified as pious lectures.

Finally, a word on Dean Ramsey's comments about judges recognizing themselves as part of an institution in the conduct of their courts. The Florida and New York Court Rules require judges to undertake an educational role, in which they talk directly to clients over the heads of lawyers. In Florida, every contingent fee case involving personal injury matters has to involve a letter from the Florida Supreme Court saying, "Here are your rights." We are trying to expand that to include other matters that involve insurance companies; it happens with respect to matrimonial matters in New York. In their courtrooms, judges could do a lot by calling to clients' attention the fact that lots of things lawyers could do for them really are disruptive of justice. I suspect clients, selfish as they often may be, will be quite happy to help the judges. That kind of dialogue in a courtroom is something the judges have started to do and should feel unembarrassed about and should continue to do.

ROBERT J. GREY, JR., ESQUIRE, Vice President of the Richmond Law Firm LeClair Ryan and immediate past chair of the ABA House of Delegates:

The accountability and access we have talked about is very critical to the development of our judicial system going forward. I think the idea of being creative, of thinking of ways to make the public feel that they are getting justice is important and that they are getting it in a way that is not an impediment to going out and buying a lawn mower, but it ought to be just as accessible. I think we must get creative in the way we use our courts. I read an article in the paper the other day about the corporate community in a particular jurisdiction getting upset, saying they are not getting their cases resolved and that they are getting so far behind. The court's response was: "We are going to dedicate a judge to your problems for a year and we are going to remove the backlog." Well, if you have money and run the economy, you can get that kind of response. But the everyday person is faced with the inability to get that access, the inability to get that kind of accountability out of our judicial system. We must think about that. I like to be triumphant. I like the idea of the "BAB," the bench, the academy, and the bar, figuring out how to take advantage of something that is underutilized, and we have got to give much more attention to it and that is ADR. We have got to figure out how to resolve problems in a way that relieves the bench of much of the responsibility of having to do everything in a formal setting because some things can be resolved informally. I think we have got to think about the fact that most people end up in court on the civil side because of a financial problem. We have got to figure out how

they can be referred to counseling where financial institutions are part of that solution because their understanding of what people go through is important to resolving their financial problems. I do not profess to have all the answers to this, but I have watched people work all their lives and end up with one financial problem that can destroy them because they did not understand how to resolve that problem. We have got to think about our role as lawyers, as jurists, in making that happen. Finally, on a pro bono basis, we are going to always go 'round and 'round about this. When I first started practicing law, a judge would call me in a criminal court and say: "I am sending over so-and-so, you've got the case. Resolve it. Represent that person." There are also situations on the civil side where judges need to be involved. They should have a list in cooperation with the bar so they can make a call and say, "William Hubbard you have this case," and William Hubbard is not going to say no. If there is not a high level of cooperation, understanding, and appreciation of what the public needs, we get to the point of being irrelevant. If the question of liability is an issue, then we have to resolve that. Those questions are resolvable. But the judges and the bar can make a difference in people's lives, and if we do not overcome that, then shame on us.

ZLAKET: I want you to know that the profession is different from what it once was. I do not mean to sound like my father. When I was a young lawyer, I was appointed to represent all kinds of people and knew it was for nothing. You cannot do that any more. The profession pushes back now and says, "You cannot force us into involuntary servitude, you do not pay us enough money." We have been sued for that. Right or wrong, I think that is a terrible comment on a profession that should be doing public service. But if you do not think the profession has changed in the last twenty-five years in that respect, I think you are badly mistaken.

STEPHEN G. MORRISON, ESQUIRE, Partner, Nelson Mullins Riley & Scarborough; Executive Vice-President, General Counsel, Chief Administrative Officer, Mynd Corporation, Columbia, South Carolina:

The business community on Main Street and Wall Street has deep suspicions of the judiciary. They suspect the independence of the judiciary; they suspect the competence of the judiciary to decide the issues before them; and more importantly, they suspect the judiciary is not competent to manage their own judicial system. I speak to you as the general counsel for a New York Stock Exchange high technology company, albeit a counsel with a bad cold, and as a partner in a law firm. When I started with the firm, Nelson Mullins had eleven lawyers; now it has close to 250 lawyers in three states. I was particularly persuaded by Jack Sammons's suggestion that we need to agree what a good lawyer is and do some left to right planning. I also think we need to agree on what a good judge is and look at some left to right planning, because I think judges ultimately are the examples of the top level of

professionalism. Let me make a couple of suggestions. From a business standpoint, a judge is viewed in the board rooms of America, whether it is on Main Street or Wall Street, as the CEO of the judicial process. Therefore, the judge is expected to bring home a result in a reasonable period of time, having exercised appropriate judicial power to be sure that the result is fair. The business community in America will suspect judges who are unable to bring home a result on time. Judges who bring home a result that is not perceived to be fair will be suspect. What that means, I think, is that many people who go from being a lawyer to being a judge are really not trained to manage a project to a result. Therefore, they do not have the management skills necessary to manage a courtroom to a result. The judge does not care what the result is as long as it is fairly arrived at and everyone is respectfully heard. The business community, on the other hand, understands risk. Their job is to take reasonable risks and ask for reasonable returns. They know they are going to lose cases in the courtroom, but what they do not understand is why the judge allows the case to take so much time and cost so much money. They do not understand why the result is not more predictable within a range of predictability and why the judges do not take care of their own rogue judges, which takes me to my last point. The most corrosive influence on the justice system is the known, rogue judge whose personal behavior, inside and outside the courtroom, is known by the bar and bench to be despicable and unacceptable; yet, the judge cannot be talked about publicly with his colleagues because the judges have difficultly in reigning the rogue judge in. This is true in appointive and political situations. The known, rogue judge, just as the known, rogue lawyers, causes a corrosion of public confidence in the judiciary and therefore in the overall justice system. I agree with my colleague on my right that it would be absolutely awesome if judges would reach beyond the legal profession and talk directly to the clients. I think judges and clients need to be brought together. It is beyond the bar, academy, and bench. It is to the point now that we have to rebuild belief in our system from the ground up. I agree that it starts at the top with judges.

Thanks.

FABIO DIMINICH, South Carolina Law Review, University of South Carolina School of Law:

First, let me warn you, as well as earning a law degree, I am also receiving a business degree, so my viewpoint may be a little different. I was reading Peter Joy's submission to this conference for these presentations this morning, and he was recommending a peer evaluation on a survey where lawyers and different people involved in a courtroom can comment or know what is going on and maybe offer suggestions to the judges. I personally like that idea. I see a courtroom, maybe to the horror of some, as a little bit of a market, which is customer based. We want to allow clients to have a good idea of what is going on in the judiciary or in a courtroom where they believe the interests of justice

are being served. Therefore, I would recommend, and maybe even Peter Joy does as well, to extend these surveys to the clients themselves, so they can offer their own comments, their own input to this process, which I believe goes to the heart of what Mrs. Barnett was saying last night when she said the problem is that the public voice seems to be nonexistent whenever lawyers come together to discuss what needs to be done to improve the process. Now you do not need to see this as a market; some could see this as just a matter of professionalism. When you have professionalism, and hopefully these surveys would encourage professionalism, this would increase the public trust in the process. When you have public trust in the process, we would have, I hope, a better perception of what lawyers do. Therefore, I just thought the suggestion was at least helpful and insightful, and other than helping Americans have a better perception of what goes on in the courtroom, I also thought it would allow for quicker action if there is a problem that is going on in the courtroom. This way we could get quicker input. I think this goes along with what one of the presenters suggested, to have a constant institutional body, which can consider such surveys and maybe offer recommendations. Moreover, I also wanted to add to the last presenters comments. I think it was Mr. Ramsey, proposing a judge-mentor program. Again, I thought this program would be helpful. A mentor can also now go specifically to something tangible, a piece of paper, which allows for the mentor to actually read what goes on in the courtroom and see how they can improve the process. I cannot say enough. It at least gives us an idea of how to get the people involved. How to help improve their perceptions and improve how their perceptions reflect on this process.

Thank you.

Special Presentation of the Open Society Institute
Presenters: Rhode, Kowal, and Campbell

DEBORAH L. RHODE, Professor and Director, Keck Center on Legal Ethics and the Legal Profession at Stanford Law School:

I would like to talk about some new initiatives that I have been working on as a consultant for the Law and Society Program. I am only going to say by way of introduction, violating the principal, that I have worked with many foundations over the years but John and Amanda are truly in a category by themselves. Both because they know and understand the subject matter and have the vision and values to want to use their resources to make real change happen in the world, and because, like lots of foundations, they are not looking for a little quick blip in the sky. They are really looking to fund programs that can be self-sustaining and make a real difference in the world.

JOHN KOWAL, Associate Director, Program on Law & Society of the Open Society Institute:

Deborah, thank you very much for those kind words. We have actually worked together now for more than three years and your contribution to our program and the field has always been so stellar. I have been very fortunate over the past four years to be involved in starting—from the ground up with Catherine and Amanda and the rest of the staff—the Program on Law and Society. Roy, we didn't bring the checkbook today, but we're here just to kind of tell you a little about what we do. Specifically, we are going to talk about our program on the legal profession, which is a program that makes grants to address the public's interest in having a legal profession that operates with the highest ethical and professional values, is committed to providing access, is committed to the public responsibility of lawyers, and puts the interests of clients and our justice system ahead of profit and self-interest.

I think, in the way of context, it would make sense if I gave you an idea of what OSI does, what the Program on Law and Society does, and why George Soros—a wealthy business man and philanthropist—cares at all about devoting substantial amounts of money to programs on the legal system and the legal profession. George Soros created the Open Society Institute about a decade ago. Initially, his focus was dealing with the emerging democracies in the former East Bloc and former Soviet Union. His aim was to help those countries emerge from totalitarian dictatorship into democratic societies by promoting what he calls an "open society." What George Soros means by an open society is a society characterized by the rule of law, respect for human rights, minority views and minority rights, a market economy, and institutions of civil society. In recent years, the foundation has made grants in more than twenty-five countries. Our total level of grant-making has been in the $300-$550 million range per year, all to advance that goal. Initially Soros focused on the international sphere, but as he looked at the challenge of building open societies in foreign countries, he began to realize that open society faced threats right here in the United States. Starting in the mid-1990s, surveying the landscape in the United States, he was particularly concerned about political assaults on immigrants in this country; problems of over-incarceration, gun violence, a corrupt campaign-finance system; restrictions and cutbacks on legal services for the poor; laws that limited the ability of unpopular groups, particularly immigrants, prisoners, and the poor, from getting into court at all; and a war on drugs that has basically wasted money and ruined lives, treating a public health problem as a criminal or military issue. He was concerned about barriers to justice and opportunity in our society and about stifling debate about all these important issues, either because of political correctness or because the people most affected, typically from marginalized and disadvantaged and powerless groups, are not participating in the debate because they are not able. To address these concerns, Soros decided to launch a separate United States Programs area within the foundation. Currently, about one-fifth of the foundation's total giving is dedicated to funding here in the United States.

Looking at the United States, one of the very early issues that concerned George Soros was, interestingly, the state of the professions. He focused on

three professions in particular: law, medicine, and journalism. You may wonder why a businessman cared at all about the legal profession. I think Martha Barnett stated it very well last night. I think George recognized that in a democratic society lawyers have a very special role to play, and he was concerned that in this country they were starting to fall down in terms of fulfilling that role. As a businessman and philosophically, Soros was concerned that market forces and what he calls "marketplace values" were beginning to crowd out the public and professional values of public service and the commitment to the public interest. I think he was definitely onto something. I think the litany of problems that Deborah spoke of this morning, and some of the things Roger Warren was talking about today are evidence of this. Even just in the last few months, we have seen studies about the rising salaries of lawyers leading almost directly to a reduction in pro bono services as lawyers struggle to bill enough hours. Soros was certainly on to something there. He asked our boss, Catherine Samuels (who, again, wishes she could be here) to consider whether a foundation really had a constructive role in dealing with the problems of the legal profession. At the same time, he also started to focus on problems in medicine and journalism. Amanda and I joined shortly thereafter, and we began a process of studying the literature and meeting with dozens of experts from academia, the bar, the judiciary, consumer groups, civil rights groups, and community groups to assess the needs and to identify whether there really were opportunities for a grantmaking foundation to get involved. We convened an advisory committee (of which Deborah was a member). We convened lots of other meetings of thinkers and scholars. Every step of the way, we kept asking ourselves: "How can OSI, as a foundation, possibly have an impact on the professionalism of lawyers?" At the same time, we developed three other program areas that I will come back to in a moment. As we did this due diligence work, we encountered a pretty broad consensus that the profession had undergone dramatic changes and that if there ever were such thing as "the good old days," it was not really possible to go back to them. But there was a need to deal with current realities, which are quite different than anything that the bar had experienced in the past. I think Roger Warren really addressed some of those realities very powerfully this morning, and I want to second his comments.

We were looking at a profession that was increasingly motivated by profit, self interest, outright greed, unethical and unprofessional conduct that was too often unexposed and unpunished, overzealous representation, and an excessive amount of adversarialism. Adversarialism is a sort of win at any cost idea, without thinking of the cost to the broader scheme, such as frivolous lawsuits, excessive fees in certain kinds of cases, abuses of the system, diminished public service and pro bono work, a public that really does not like or respect the legal profession, lawyer dissatisfaction, lack of diversity, and equal opportunity at every level of the profession. At the foundation we came to call it "a battle for the soul of the profession" between lawyers who had a predominant focus on the bottom line and lawyers who believed in a broader

vision of what the legal profession could be. That broader vision, obviously, is a commitment to pro bono and public service, to maintaining professional and ethical values which go beyond the least common denominator—basically, a commitment to always act in the best interests of the system of justice.

In terms of thinking of what we could do with grant dollars, we decided initially to focus our grantmaking on encouraging ways to raise standards of conduct to promote the public responsibility of the profession (and, by that, we definitely include the profession's commitment to access to justice for everyone in this country) and on strengthening accountability mechanisms both inside and outside of the profession. Amanda is going to talk a little bit more about the details of those priorities and how we have used some of our grants to bring them about. Basically, as we have continued to refine and develop our grantmaking program in this area, we are encouraged to think there may be a window of opportunity now to have an impact. First, we see this in the growing recognition within the profession and the academy that addressing matters of professionalism is critically important. I think you all and the work that you are doing are really the best evidence of that. This is all obviously very important and significant. Secondly, the current, very dramatic changes in the profession—the impact of market forces, but also things like multidisciplinary practices and globalization—provide an opportunity to rethink what being a professional means. Martha Barnett talked about that yesterday. Again, there is a window of opportunity. Clearly, the growing number of unhappy lawyers who look for a little more meaning and satisfaction in their jobs is prompting the profession to look for solutions. Again, a window of opportunity. Clearly, the public's increasing disdain for lawyers and the legal profession, and its increasing lack of trust and confidence in the system, pressures all of us to do something.

At the same time, though, we do recognize that there are some significant obstacles in terms of what we can do as a foundation. First, we have to recognize that there exists a certain amount of inertia and sometimes resistance from inside the profession, from inside the academy and the judiciary, against really bringing about meaningful change. Our grantmaking strategy, which again, Amanda will talk about in a minute, envisions using multiple outside leverage points to try to influence the conduct and values of the profession. But even so, those of us outside the profession can only do so much in terms of dealing with the entrenched self-interest of those in the profession. A lot of that is understandable self-interest—it is scary to move to a whole new way of doing things. I think the entrenched self-interest of the profession comes out most importantly in the issue of accountability. The profession has historically not been accountable to those outside, although I think that is something that is clearly in the process of changing. It can resist and have it imposed on the profession, or the profession can become a partner in creating a system of accountability that brings in the public voice and the public interest. You have called for leadership from every sector of the profession. If we are going to

make a difference, we are going to need partners, and we are going to need leadership from the profession, the academy, and the judiciary.

The second obstacle we have faced is the fact that, frankly, there is not much of a field to fund. As a grantmaking organization, we fund charitable organizations that advance important goals. In some areas, we have many partners to work with. But, with regard to the legal profession, there are surprisingly few institutes and organizations outside the profession that have the credibility to serve a watch-dog function, to help educate the public, and to deal with very important public policy issues involving the public's interest in the profession and the public's interest in the legal system. When you compare this situation, for example, to the health care field, where there are lots of organizations that speak out for the public's interest in health care, that is a really surprising thing. Amanda is going to talk a little bit, and Deborah as well, about planning to perhaps fund and seed the new organization that would serve as an independent and credible public policy voice for the public's interest in the legal system and legal profession.

The third obstacle is, basically, at this point we are the only major funder interested in the profession. Issues involving the legal profession and legal system have not been a priority for other foundations. We have been trying to change that—making connections and engaging in dialogue with other foundations to show them why it is in their best interests to take an interest in this as well. We are making some progress, but in the short term, we do not really have a lot of partners, which means we have to be extremely strategic in terms of investing the money that we have. Unfortunately, that means we do not have resources to invest in some very worthwhile projects, particularly those that have a particularly localized impact. We have a mandate from our Board of Trustees to make grants that have a broad impact—either a national impact or fairly wide ranging one.

In wrapping up, I did want to put in perspective, very quickly, that we have three or four other areas that we are funding. They are all interrelated to some extent. In order to respond to the cutbacks in funding to legal services and the related restrictions, and to deal with the fact that the current legal system really does not meet the legal needs of low- and middle-income Americans, we have a separate grantmaking portfolio to promote access to justice. Access to justice deals with legislation that either stripped away court jurisdiction in cases involving prisoners, immigrants, and the poor or that made it harder to get to court. Access to justice also deals with the current climate of intimidation of judges, intrusions on judicial independence, and corruption of judicial elections through special interest politics and campaign contributions. We have a program on judicial independence to deal with the very sorry state of funding for indigent defense in this country and the growing concern about wrongful convictions in criminal cases. In particular, in death penalty cases, we seeded and recently spun off a grantmaking initiative on indigent defense and death penalty called the Gideon Project. To deal with the relative shortage of public service opportunities for able young lawyers coming out of law school, who

want to do public service but do not have the opportunity, we funded, through the National Association of Public Interest Law (NAPIL) a challenge grant to support fellowships. It has rapidly become the largest public interest fellowship program in the country.

These separate categories overlap in significant ways. Our work in judicial independence may be influenced by the work we do in professionalism. An example of this came up today. How can judges regulate and rein in the profession when they rely on the profession for electoral support, campaign contributions, and the like? Certainly, much of our concern about professionalism is really a commitment to assure access.

Amanda is going to talk about our five priority areas of grantmaking for the legal profession program. I will just rattle them off, and then let her talk about them in a little more detail. One is promoting the public responsibilities of lawyers, including public service and acting as guardians of our justice system, as a counterweight to marketplace values. The second is improving the professional and ethical conduct of lawyers. Third is increasing the accountability and improving effective regulation of the profession, including legal education. Fourth is increasing legal opportunity and diversity at all levels of the profession. Fifth is promoting the role of lawyers as problem solvers, seeking constructive solutions to fundamental and systemic problems. We brought with us our program guidelines which give you a better idea of what we do and also provide some contact information. We would certainly be happy to hear from anyone who wants more information about the program or the foundation overall.

Thank you.

AMANDA CAMPBELL, Senior Program Associate, Program on Law & Society of the Open Society Institute:

> *Since the conference, the Program on Law & Society has decided to narrow the focus of its Legal Profession Program to a few ongoing projects, including the NAPIL Fellowships Program. The program will no longer accept new proposals in this area.*

I am going to follow up on what John said and outline our five major goals in the area of the Legal Profession Program. The first goal is to find a counterweight to the marketplace values that have increasingly dominated the profession by promoting the public responsibilities of lawyers, including encouraging lawyers to engage in public service activities and acting as a guardian to the justice system. In order to accomplish this goal, we have developed a funding strategy that seeks to institutionalize professional values and a commitment to public service during law school. For example, we have supported NAPIL's student chapters on 160 law school campuses to promote

and support students' interest in public service and to address barriers to public service such as high debt loads.

Another way to promote public service early on is to provide pro bono and public service opportunities during law school. In addition to NAPIL's work that I just described, we have also supported the Association of American Law Schools' (AALS) student pro bono project that grew out of Deborah Rhode's year as AALS president. This project encourages law schools to develop and expand pro bono opportunities for students and provides technical assistance to interested schools.

In addition to supporting public service during law school, we have also worked to increase the number of public service opportunities available to young lawyers after they graduate. A major grant in this area has been to provide matching support to NAPIL's Fellowships for Equal Justice program. Since the matching program began, it has helped to support 191 fellows working in communities across the country to develop innovative and exciting programs.

In addition to full-time public service, we are also interested in supporting pro bono work by the private bar. We have supported innovative uses of technology to make it easier for attorneys to take on cases and to provide them with substantive support. One exciting project we have supported in this area is Pro Bono Net. Pro Bono Net utilizes the Internet to link pro bono attorneys with cases and non-profit organizations that provide substantive support. In supporting a greater commitment to pro bono, we have focused on areas of greatest need, including the South, the Plains, and rural areas. We have also made a special effort to engage sectors of the bar that have not traditionally been as involved in pro bono service, including corporate counsel.

Our second goal is to improve the professional and ethical conduct of lawyers. One of our strategies has been to support effective programs developed by the law schools, courts, bar associations, and firms that promote professional values and conduct. For example, we have supported a pilot mentoring program developed by the Georgia Chief Justice's Commission on Professionalism. Another way to promote ethical and professional conduct is to study the institutional structures that create incentives and disincentives to professional conduct. For example, we have supported work by David Wilkins at Harvard Law School who is studying and promoting effective "ethical infrastructures" within large law firms.

We also believe that the work of the centers, commissions, and committees that many of you are involved in are very important in advancing this goal. We have provided support to the University of South Carolina's Center on Professionalism to develop a website to coordinate the various professionalism activities going on across the country. We hope this will foster greater cooperation and communication.

We also seek to promote the judiciary's role in defining and enforcing higher standards of conduct. For example, we have given a grant to the ABA Center for Professionalism to enable them to assist the Conference of Chief

Justices to implement their National Action Plan that calls for greater judicial enforcement.

Our third goal is to increase the accountability and effective regulation of the profession, including legal education. To accomplish this, we seek to institutionalize multiple sources of accountability both inside and outside the profession. Within the profession we want to strengthen the self-regulatory processes by expanding the bar's role and encouraging judicial leadership. We also believe it is important to support organizations outside the profession since there are certain issues that are difficult for the bar to take on itself. Deborah Rhode is currently working with us as a consultant to explore the possibility of supporting the creation of a new organization that would serve as an independent public policy voice on important issues confronting the profession and legal education. This new organization, which we currently call the Center for Justice in the Public Interest, is something we have been thinking about at the foundation for the past three years. The need for this new independent organization evolved from conversations between our advisory committee and George Soros while discussing how we could affect the values of profession, increase accountability, and raise standards of conduct. At this point, our advisory committee has enthusiastically endorsed this idea; however, it has yet to go before OSI's board. Deborah Rhode will be talking in more detail about the proposed initiative and what types of activities it might take on.

In addition to the Center, we also are seeking to encourage existing consumer and watchdog groups to expand their work to include the legal profession as part of their mission. Specifically, we believe there is a need to document and expose the most egregious problems with the profession and propose reforms to address these problems. At this time, we are considering a proposal from the Center for Public Integrity to undertake a project to document the level of wrongful convictions due to prosecutorial malpractice and to determine what, if any, disciplinary action was taken. We are also interested in documenting the impact of the high cost of legal education on a variety of issues including diversity, access to justice, and lawyer conduct.

Our fourth goal is to increase equal opportunity and diversity at all levels of the profession by identifying and addressing barriers to diversity. One initiative we have funded to pursue this goal is a planning process that involves a variety of organizations including Lawyers for One America, which is a presidential initiative on diversity, the ABA, and the national minority bar associations. The goal of the planning process is to consider the creation of an entity to work on this area. We are also interested in helping to build the capacity of organizations representing minority attorneys so that they can play a greater role on issues of diversity and access to justice.

Our fifth and final goal is to promote the roles of lawyers as problem-solvers seeking constructive solutions to fundamental and systemic problems. One way we have tried to do this is by supporting the integration of problem-solving into the core of law school curriculum. For example, we have supported the CPR Institute for Dispute Resolution to work with a group of

leading academics in this field to develop recommendations for how law schools could integrate these approaches. We are also interested in facilitating the creation of a network among the various problem-solving initiatives being undertaken by courts, prosecutors, public defenders, legal services lawyers, and law schools in order to foster greater communication and information sharing. We will be convening a meeting later this year to discuss this further. That concludes my remarks. Since I have only given a few examples of our grants please feel free to call us or visit our website at www.soros.org/lawandsociety for more information.

Thank you.

THIRD PANEL: The Organized Bar's Response to Professionalism Issues
Presenters: Carter, Cornielle, Garwin
Responders: Crystal, Green, Warren, and Kern-Fuller

RICHARD E. CARTER—Continuing Legal Education:

In some ways, I am an unusual person to talk about the response of the organized bar because we are in a sense a part of the disorganized or unorganized bar. We are not officially a part of any bar association. We are entitled the Committee on Continuing Professional Education. There is a committee, but it is really an organization. We have about seventy-five employees, and we are based in Philadelphia. I am going to talk a little bit about what we do and how that fits into the overall CLE picture. Then, I will talk about some things that are quite unusual, I think, for a CLE organization to do.

The names American Bar Association and American Law Institute are in the title of the organization, but we are not a part of either one of those organizations. They each appoint half of the committee that oversees our activities. We began in response to the need to train lawyers after World War II. Therefore, we have been going for a little more than fifty years. Of course, we do a number of cooperative things with both the American Law Institute and the American Bar Association. But, as I said, we are not actually a part of those organizations, and are therefore in a much different position in terms of what we can do than some of the CLE organizations that are a part of a bar association. For one thing, we have to pay our own way. We receive no funds from either the Institute or the ABA, and we have to respond to what lawyers want even though that is not always what they need. We have to be quite conscious of that. At the same time, we are able to accumulate funds because we are not asked to turn them over to our sponsors, and we have been engaged in a number of studies that we pay for, for the most part, without outside funding. I am going to talk about a couple of those in a minute.

First, let me just run through the sorts of things we do that are common in CLE organizations in general. We offer courses of study, which are usually two and a half days long. We do a couple of summer courses that are five days.

Amazingly enough in this electronic world, with all the changes that have come as a result of, first, video and now the internet, the traditional courses are still about sixty percent of the revenue that we bring in. The courses have expanded in number and in type. We brought in two new staff members in the courses department just in the last year. Therefore, it is still very much a viable part of what makes up a CLE provider. I think that is true for most of the state organizations and the national organizations. I am, in a sense, leaving out any special considerations for the for-profit organizations. Many of them are what we call "cherry-pickers" that come in and do particular things in particular ways. That is fine, and the competition has increased considerably since mandatory CLE has spread to thirty-eight of the fifty states. We do fairly well against the competition. We also, and this is unusual, have a satellite television network—the American Law Network. We offer about thirty programs on a regular basis each year on the network, and then we do a number of special programs. Most of the programs are provided by ALI-ABA, the ABA Center on CLE, and the Practicing Law Institute, which is based in New York. We also do a number of special programs with organizations that want to do just one or two programs. For example, next month we will be doing a program that came out of a consent decree in an action brought by the state of New York against Sears for discriminating against employees on the basis of religion. We will be doing a broadcast, which is paid for by Sears, on the consent decree to a number of our regular sites and to some special sites, especially at other corporations, about accommodation for religion in the workplace. This is probably our most unusual program. We also publish a number of books and seven magazines. The theme of the magazines began with the Practical Lawyer many years ago. We now have the *Practical Tax Lawyer*, *The Practical Litigator*, and others. I invite you to consider an article in one of these publications. The articles are wholly practical in nature. They are not the sort of thing that would be published by a bar journal or law review, but they are quite substantive, and if you are not familiar with them, take a look. We invite you to write about the issues that interest you in the area of ethics and professionalism. We get, as you might guess, very few articles submitted in those areas, but there is certainly a place for them.

It is impossible today to talk about what a CLE organization offers or can offer without talking about the electronic age. There is not a week that goes by that I do not hear from some dot com that either wants to provide courses or wants "content," as they say—material that they can sell in some fashion that we do not. We do have our own website, and a number of electronic offerings and are under contract to do considerably more over the next few months. Technology is increasing, and you should be in contact with some of these organizations. Perhaps you are. But there are some, such as e-Attorney, which may be in your law schools, that match law firms and law students, and they are always looking for content that they can make available to law students. I think Stanford is one of the schools that participates in e-Attorney. We are about to offer a number of things specifically for graduating students. For

example, we have a book, *From Law School to Law Practice*. When I go back, I will probably have three or four messages from some dot com that wants to talk to us about making available some form of our content.

We also have, in addition to the American Law Network, something called the American Institute for Law Training in the Office (AILTO). It is an organization that concentrates on training in the law office. To some extent, we act as a broker, putting the firms in touch with people who offer a course for in-house consumption. We have a sort of stable of people that we recommend to firms that contact us. A firm can also become a member of AILTO, and if they do that, they get certain things we do not otherwise provide without cost. For example, one of the things I know some of you are familiar with—and I thought I would bring to your attention that it is in a second edition—is *Skills and Ethics in the Practice of Law*. I know that some of you use that, but you may not be familiar with the new second edition.

We also solicit your interest in an award that we give. We have an award called the Francis Rawl Award, which is given for outstanding service in CLE. Certainly we would entertain nominations from those who deal primarily with the issues of professionalism and ethics. As you might guess, most of the nominations we receive are not about professionalism and ethics. The award is given each year. It is named for an early officer of the ABA who founded a Philadelphia law firm, and the firm funded, so to speak, this back in 1976 as a bicentennial celebration for the law firm.

One other matter that I should mention, as a CLE provider, is the impact of mandatory CLE. As I said, mandatory is in thirty-eight states now, and therefore, people say, "You must have a real bonanza with the mandatory rules." I think there is more competition as a result of the mandatory rules, but we certainly do not have a bonanza. We have been operating for more than fifty years. People are interested in what we have regardless of whether they need twelve hours or fifteen hours or whatever it may be. In fact, it causes problems for us because the requirement that some states have for putting the ethics in one or two hours or whatever it is, and the person who comes from one of those states says, "Where's my form that I need to submit to verify the one hour." We would much rather make the decision on the basis of what is educationally the best thing to do or what is the best way for a lawyer to learn this, rather than whether it should be one hour or two hours or whatever.

We prepare a number of position papers for commissions on mandatory CLE states. We and the Association for Continuing Legal Education have had some impact on the rules. I welcome any impact that you have, any help that you can give. I mentioned the Association for Continuing Legal Education. The Association is made up of all sorts of providers, including for-profits, and we have worked with them on a number of matters, including standards for evaluating CLE. Some of you may be interested in looking at those standards as they have been developed. I said we are interested in the educational aspects of what we are doing rather than the rules. We have also done a study of adult learning, in particular lawyer learning, and this is what it looks like. I will try

not to throw it across the room. The reporter is Cliff Baden, who is with the Harvard Graduate School of Education. It can be used in a number of contexts. If you are not familiar with it, we would gladly—and freely—make it available to you. I think you would find it interesting.

Thank you.

ARTHUR H. GARWIN, Professionalism Counsel and Director of Publications and Conference Planning for the ABA Center for Professional Responsibility:

American Bar Association Initiatives

I am the professionalism counsel at the American Bar Association. I have been looking forward to coming to Savannah, having never been here before, because my brother was born here while my father was serving in the Army during World War II. It struck me as I was listening to some of the other speakers that my father knew why he was here. He knew what he was fighting for and against, but ironically, now that I am here, and though I am the ABA's professionalism counsel, I cannot describe what we in this room are fighting for or against.

I get calls all the time from people who want to put on a professionalism program, who want me to help them put it together. Often one of the first things they say is: "But I do not want to talk about civility. I want to talk about something else." They hate it when you talk about civility because it has been overdone, and professionalism is more than that. So I start giving them other suggestions, and then they stop me and say, "Well that is ethics. I do not want to talk about ethics. I want to talk about something else." Then I ask, "Can you give me a clue what you want to talk about? What you think professionalism is?" They do not have an answer; that is why they have called me. Personally, my feeling is that professionalism, if you do not mind a somewhat circular definition, is that which the public has the right to expect of the profession and every member of it. I think that Judge Warren gave us a start in recognizing some of what that means. I have seen lists of professional qualities, for example, that which the Georgia Chief Justice's Commission on Professionalism has put forth. I would like to mention a few projects that address some of the things we are trying to deal with.

First of all, Professor Rhode spoke about the regulatory system and how it is perhaps not doing quite what it needs to be doing. I guarantee you, from the ABA's perspective at least, that it is not for the lack of trying. I hope you are all familiar with the report—Lawyer Regulation for a New Century, or as it is commonly called, the McKay Report. If you are interested in this area, and I assume that you are or you would not be here, and you do not have a copy of this report, then we are doing something wrong. This report was issued in 1992, and its point was that there were things that needed to be addressed about the regulatory system, including issues regarding insufficient public involvement,

and that we had to find a way to improve the system. Ever since then the ABA Standing Committee on Professional Discipline, through the Center for Professional Responsibility, has been consulting with the states. The Committee has held consultations in at least forty states with a goal towards improving their regulatory systems and I think, although I have no scientific evidence, with some good results. We do know that many states have adopted a lot of the ideas that were suggested by the McKay Report, including the development of a Central Intake Office and the programs that such an office uses for diverting those client complaints that do not rise to the level of an ethical violation. I know from talking to people that states such as Mississippi and Georgia have noted a substantial decrease in the number of matters that must be investigated by their disciplinary agencies since their implementation of Central Intake programs. I do not know if there has been a survey of the public, but I am told that the public is feeling greater satisfaction with the process in these states since the implementation. Therefore, I think there is progress being made, but there is certainly a long way to go. Certainly it is up to the individual states, but there is a mechanism there to solve some of the problems.

Next, I would like to say a few words about what has been mentioned earlier by Justice Zlaket—the Conference of Chief Justices' National Action Plan on Lawyer Conduct and Professionalism. The ABA Center for Professional Responsibility worked with the National Center for State Courts and the Conference of Chief Justices in hosting a conference in 1997 that led to the development of the Action Plan. In March 2001, there is going to be a follow-up conference that will bring the chief justices back together again to discuss implementation of the recommendations in the Action Plan. We have commitments from at least thirty-five of the chief justices so far. We are going to see what we can do to develop specific programs to implement the ideas spawned in the Action Plan.

One of the items that is part of the plan, as mentioned earlier, is the establishment of professionalism commissions. Specifically, last weekend we brought together a group of people representing some of the professionalism commissions now in existence. Five of the commissions were represented in person; three others could not be there, but sent us their answers to our written survey. Today, I found out that two new commissions have been approved, in South Carolina and New Mexico. Professor Bruce Green, who is also serving the Center as reporter for the Commission on Multijurisdictional Practice, is going to be working on a guide book to help those states that are interested in establishing their own professionalism commissions. The guide will not have a single approach because, as we discovered last weekend, and I am sure that Bruce would agree, there are a number of different approaches, and they all have something of value to offer. So the guide will be coming out, and I hope that people think it is important. Again, I have no scientific evidence that these commissions accomplish their stated goals, but we think, as Justice Zlaket said earlier, they are a good way of addressing certain issues.

Two more things I would like to mention quickly. One is *The Professional Lawyer* magazine. Someone was asking whether the Center for Professional Responsibility has some sort of periodic publication. For those of you who do not know about it, it comes out quarterly, and we welcome and encourage submissions. Interestingly enough, on the plane ride here I was reading an article that is going to be in the next issue, written by Professor John Humbach of Pace University School of Law, entitled *Abuse of Confidentiality and Fabricated Controversy*. The first section of the article is entitled *A Crisis of Public Confidence*. I think when you see this article you will see that it has a lot to do with some of the things we have been talking about today.

Finally, I would like to talk about the Gambrell Professionalism Awards. Hopefully, you are all familiar with them. The Center for Professional Responsibility, through the Standing Committee on Professionalism, has been giving out these awards for ten years. Our website contains summaries of all the winning programs. There have been a total of twenty-eight up to now. The website also has the award guidelines, which are in your materials at Tab B. As a result of this project, we have gathered a lot of good information about various programs from law schools, bar associations, law firms, and other types of organizations. The Standing Committee on Professionalism has been discussing for some time whether we should make any changes in how we decide who receives these awards. We cannot think of a better group than the one gathered here for this conference to come to and say: "Give us your ideas. Take a look at our guidelines. Do you think that we are still going about this the right way? Should we make some changes? What should we be focusing on?" In that regard, let me tell you that over the years we have had a number of disagreements over what constitutes a professionalism program. We will be meeting and someone will say, "This is not a professionalism program because it is about service as opposed to lawyer conduct." So we will say, "A pro bono program is not a professionalism program because it is not about lawyer conduct." Then someone will say about a different program, "This is not a professionalism program because it is about teaching ethics." Well, I happen to think that professionalism is all-encompassing. That is my notion of job security. We are interested in what you have to say about this. Let me know. I am easy to find. Many of you have given us your ideas about other matters in the past. To paraphrase Bob Newhart, from *The Buttoned Down Mind of Bob Newhart* - My door is always open; you know why it is open; would somebody please return my door!

Thank you.

CRYSTAL: Art Garwin mentioned the McKay Report and changes in the disciplinary process. I certainly think it is possible that the professionalism movement could take more of a regulatory or disciplinary turn, and it may well be that some professionalism discussions will lead to greater regulatory efforts, but it seems to me that the core of professionalism is nonregulatory. If that is true, I think that approach has important implications for the focus of

professionalism efforts. Because if professionalism is going to be nonregulatory, then the question becomes: How are we going to affect the behavior of lawyers? My answer to that is: If we are going to affect the behavior of lawyers in a nonregulatory fashion, we have to do that through influencing the culture of the institutions in which they practice. It seems to me that a major focus of professionalism endeavors has to be on cultural change. That leads to certain implications about the kinds of efforts that I would like to see, and they would include the following: There is an important role for sociological studies of the practices of law firms. How is culture formed within law firms? How does culture change? What kind of efforts could lead to changes in law firm cultures? I am picking on law firms right now but this approach could apply to any organization.

In terms of the efforts of law schools, there could be a role for placement offices, where placement offices focus on helping students look at the culture of different law firms and try to talk about different cultural forms that they see and how student's values relate to the organizational cultures that they may identify.

In terms of law school pro bono programs, it would be important to have pro bono programs that have an institutional component to them. I think very highly of our voluntary pro bono program at South Carolina in which a large number of students participate. It has really become part of the ethic, the ethos of the institution. It not only affects the behavior and attitude of the students in law school, but it carries over into the practice of law later on. Therefore, my fundamental point is that if we are going to have success in the professionalism effort, and it is going to be nonregulatory, I think we have to design programs, ideas, and methods that focus on cultural change in the institutions in which lawyers practice.

Thank you.

BRUCE A. GREEN, Louis Stein Professor, Fordham University School of Law:

Like everything else I have heard today, these discussions provoke much thought. I have many responses, but I will provide just a few of them quickly.

I have not been involved in my state's admissions process, but I have been involved on a volunteer basis in the discipline process. It gives me a little insight, in part because we deal with readmissions of lawyers who have been disbarred. I am not terribly optimistic about the ability of an admissions process to get it right, either in terms of excluding people who are not qualified or lack the requisite character or in terms of identifying those who ought to be admitted. It is a very imperfect process. To some degree, I worry about exams which may have the effect of disproportionately excluding minorities. I very much worry about admitting those who should not be admitted but who invested so much money in getting a legal education that one's tendency is to say, "Let's admit them, and then we will see how they do." That puts a heavy

burden on the disciplinary process later to figure out who has acted wrongly and who ought to be kicked out of the profession. The problem is that the disciplinary processes do not work all that well either, in part because of the under-reporting of misconduct. The bar ought to re-think a reporting rule which, even at best, is going to be vastly under-complied with because of all the inhibitions against reporting lawyer misconduct. Then you add to that a confidentiality provision, which basically takes the guts out of the rule. The only misconduct you have to report is misconduct about which you learned outside a confidential relationship, which is a very small minority of the misconduct that lawyers learn about.

I would make one other point. I think it was Yogi Berra who said something like, "You can learn a lot from watching." I think the organized bar could learn a lot from watching both its CLE programs and the disciplinary process. In the disciplinary process, as Roy suggested, you see a lot of people who are the subject of complaints. Many of them did not engage in sanctionable misconduct, but sure are not performing at a very high level. I think the bar needs to figure out how to deal with them. In New York, before we had mandatory CLE, my law school worked with the disciplinary authorities in Manhattan to create a program for people who were the subject of many, many complaints but who had not engaged in sanctionable misconduct. We affectionately referred to it, informally at least, as the school for the ethically-challenged. Basically, the idea was to give lawyers some ideas about how to communicate better with clients and how to avoid complaints. It is also worth thinking about why people engage in sanctionable misconduct. Thinking about that has resulted, for example, in great programs to deal with lawyers engaged in substance abuse. There may be other things that you can learn about why lawyers engage in misconduct that can lead to other responses by the bar associations. Also, in my state, through the CLE process, we have discovered a lot of ambiguities in our *Code of Professional Responsibility*. At CLE programs, lawyers are asking questions which panelists have trouble answering. Therefore, besides the educational function, the bar associations should view the CLE programs as an opportunity to learn more about where there are gaps in our professional regulation.

WARREN: I would just like to reinforce three points that others of you have made. First, Robert Gray talked about "BAB," as contrasted with the ABA I guess: Bench, Academy, and Bar. Deborah Rhode, I thought quite appropriately, asked about what I would describe as "BAB plus" I guess, that is, "What about the public?" I want to encourage you to include the public in this whole process. If your interest is reform, if your interest is to make things better, there is no better vehicle than involving the clients, the customers, in that process. If your goal is to promote the service role of lawyers, the best way to do that is to allow the lawyers to respond directly to the concerns of the people that they serve. That is why the most promising format among the three recent presidential debates was the third one, where citizens could actually talk

directly to the candidates, rather than just have all the questions posed by a moderator. It is not that scary. Judges have as many reasons as judges, plus more as lawyers, to be anxious about being in public forums interacting directly with people that they serve. Three years ago, the idea that judges would deal directly with the citizens in their communities was terribly intimidating and frightening. Three years later, we have a lot more experience. We now have court-planning processes where citizens are actually sitting down with judges and doing strategic planning for courts. The National Conference on Public Trust and Confidence brought five hundred people together, equally divided among judges, lawyers, court administrators, and members of the public. The National Action Plan that came out of that conference is as good as it is principally because the customers were there and challenged the folks that were supposed to be serving them. They do not want to run the courts; they do not want to run the legal profession; they just want to be heard.

Second, and I do not know the answer to this problem, but as I sit here it troubles me. On the one hand, I am talking about what the public's concerns are, and, on the other hand, Professor Crystal and others have talked about the realities of law practice. I do not know all that much about the realities of law practice, but as I hear you talk about them it seems to me that the challenge here is really to bring together thinking that is responsive to the public's concerns with what we know about the realities of law practice and figure out ways to make those things compatible. I think that law schools and bar associations have a major role to play especially if they work together. For example, there is a course by Professor Goldberg on law practice based on the TV series *The Practice*. The course discusses the moral, ethical, and personal dilemmas that litigants and lawyers face based on dramatizations from the TV show. It sounds like a great course to me. It would sound even better if a curriculum based on *The Practice* was then followed up by the bar association with a mentoring program in law firms, where senior partners could mentor young associates dealing with those very same problems. I am sure there are other ways in which law schools and bar associations could partner in addressing—rather than having law school curricula developed independently of bar association-sponsored programs in law firms, working in conjunction with each other.

Third, ADR. In California we came to call this "appropriate" dispute resolution rather than "alternative" dispute resolution. I think that ADR might be a wonderful vehicle to address some of the concerns which I described—the public's concerns. There are some disputes which undoubtedly are inherently legal disputes, where the underlying issue concerns legal compliance, for example. But most disputes are not inherently legal. Just because a problem can be defined in terms of legal claims and defenses, does not mean that it has to be, and does not mean that it should be. Most people when they go to see a lawyer, do so out of frustration and because they have some problem they are trying to resolve. I think lawyers should view legal claims and defenses as only one of the tools in their toolbox to help the client resolve those issues and

address those underlying problems. Imagine if lawyers came to be viewed that way, by the public, as folks to go to for help in solving problems. If it turns out that litigation is what has to be done in order to resolve the problem, fine. But in many cases, it will turn out quite differently. So, I am viewing "appropriate" dispute resolution, not as something that a lawyer gets interested in after he or she has already filed a lawsuit, but something that happens upon the first contact with a lawyer. If there were more emphasis on "appropriate" dispute resolution in our *Codes of Professional Conduct*, in law school, and by the bar associations, it seems to me it might offer a vehicle that would help address virtually all of the public concerns that I mentioned earlier. Then, lawyers would be viewed not as folks interested in making money, interested in filing lawsuits, interested in promoting their own unique role, but as being interested in helping people solve their problems. Therefore, the whole ethic of service and care comes into play. Lawyers would not be viewed as self promotional, but as trying to help someone else. So, it just seems to me that taking the focal point off of litigation as a solution to problems and looking at all of the other ways in which lawyers can help clients, would be a vehicle that would address many of the public's concerns about the profession.

CANDY KERN-FULLER, South Carolina Law Review, University of South Carolina School of Law:

As only a second-year law student can be, I might be a bit idealistic in all of this. I do recall before starting law school, when I worked as a paralegal, one lawyer who behaved particularly badly. I heard at least five other lawyers who were in this lawyer's law school class state they knew that this particular lawyer might behave badly because of the way that lawyer behaved in law school. As a second-year law student, I have seen some of those traits in some, but fortunately not many of my classmates and other students. I think there is a lot that the organized bar can do. The bar admission process might be that place. Currently, at least in our state, we have to get references when we apply for the bar. Usually, what happens is we choose those references, and those we select write the letters for us. Caroline Heil, the Editor in Chief of the *South Carolina Law Review*, made a comment to me earlier that got me thinking: What if instead of us choosing who writes those letters, the writers were selected randomly? What if the bar selected, at random, professors that we have had during our course of law school to write those letters and give an honest evaluation of how we performed? What if the bar asked the members of our class, at random, in a confidential way, how we behave, and what if that kind of peer review continued as a lawyer? In South Carolina, when our judges come up for re-election, the bar has a survey process where they ask practicing lawyers what they think about the judges' demeanor and competence. What if we did that with lawyers who practiced? What if we asked other lawyers how the people whom they practice with behave as lawyers, and how they interact with other lawyers? Further, what if we also asked the judiciary to rate lawyers

who appear in front of them? Would that help improve the professionalism of the bar in South Carolina and across the nation? I do not know, but as an idealistic second-year law student, it is a modest proposal to consider.

PANEL DISCUSSION: Proposals for New Initiatives
Presenters: Rhode, Atkinson, Jones, Joy, Zlaket, Whelan, and Green
Responders: Grey, Morrison, Ramsey, Sammons, Wendel, Norvell

RHODE: Here we are at the almost closing moments to talk about new initiatives, and I am going first because I am the one who can be reliably counted on to keep within the time limits and set a good example. Therefore, I am going to enforce those limits rigidly, particularly for myself, and just say a couple of words. Fortunately, I only need to say a couple of words because John Kowal and Amanda Campbell have so ably described the project on which I have been working as a consultant for the Open Society Institute.

It reflects extensive thought and consultation among a broad range of individuals. In fact, over the last six months, I have interviewed about seventy-five experts from consumer organizations, court-reform programs, public interest groups, professionalism projects, bar associations, courts, and universities. I have asked these experts whether they perceive significant unaddressed problems in the profession, what those might be, and what strategies they think might be effective in addressing them. Therefore, part of the mission was to find out just what is being done, by whom, and with what success on issues of professional regulation and access to justice, as well as what sorts of institutional structures individuals think might need to be created to deal with some of the problems. Two points emerge clearly from that set of consultations, and they have led to a proposal for a Center on Justice and Public Interest that the Open Society Institute is now considering. It is unclear what will happen since the Board has yet to consider the proposal. So I am here just to solicit ideas and suggestions as part of the consultation process. By way of background, let me just highlight two points that have emerged at this conference and emerged also from that process of consultation.

First, experts thought that there were significant problems in the regulation of the legal profession and in the distribution of legal services. Somewhat to my surprise, there was an equally broad consensus about the need for an independent disinterested voice on those issues, such as the proposed center. That center should be capable of working collaboratively with the bar, but also capable of challenging the bar in the areas where its regulation has not been adequate. This view came from bar leaders as much as anyone else. Many leaders had been bruised by the internal politics necessary to get their organizations to do the right thing in areas involving regulation in the public interest.

There was an equally striking degree of consensus among experts about the need for some kind of independent structure of accountability. There was an equally broad lack of consensus, however, about what I call the

"professionalism problem," which is the lack of consensus about what exactly the problem is. In this particular project, people not only disagreed about the nature of the problems confronting the legal profession, but they also disagreed about what the priorities should be for an independent structure of accountability with very limited resources. Most importantly, they disagreed about who should decide these priorities and by what criteria.

There are an enormous number of challenges in figuring out how one would "represent the public interest" on bar regulatory issues. Rather than belabor what those challenges are, I simply invite some brief responses by the panelists or the audience and issue an open invitation for people to talk with me, John, Amanda, or Catherine Samuels about their views of what could build greater public accountability into the oversight process. With that in mind, our plan was, and my plan is, to get people's reactions after each presentation from whomever on the panel wants to respond, not to force all the commentators to respond on everything, but to open it up to everyone for any thoughts on particular proposals.

MORRISON: Deborah, if that was an invitation, I am particularly excited about this individual proposal. I think the Open Society Institute has got it right. In my experience, transparency is what ultimately changes behavior and, most particularly in my experience, transparency in the board room changes behavior. The particular board room requirement for transparency is the Securities and Exchange Commission, who requires transparency in the financial dealings of your company. That particular set of requirements and the continued watch-dog efforts of the Securities and Exchange Commission do have an impact on the conduct of top management in board room discussions. I think a similar type of open society or transparency into legal issues of professionalism can, and will, change behavior over a long period of time, just as it has in other types of regulation.

RHODE: Other thoughts? John and Amanda, I am going to take this as a burst of acclamation. Nobody had anything critical to say, am I right? Good, thank you.

GREY: I guess this gets to the point in the program where we all find who our symbiotic partners are and the like, and I just want to tell you I like Roger Warren. It is the public that we have got to focus on. It is the public whose interest we have got to promote, and notwithstanding the fact that there are those who would be critical of how we would do that, we must redouble our efforts to make sure that it is done in a way that responds to the complexity of our society. We are going to be challenged in ways that we have not dreamed about from our colleagues, judges, politicians, and everybody else. I would like to see, for example, a corporate model. I would like to see a model where corporations encourage, demand, and otherwise employ their law firms to engage in public service, where they do it as a cooperative venture, and the

corporation gets the credit for the idea, the law firms get the credit for the execution, and they both are mutually funded. We can do things creatively to create a better public perception of what we are as professionals, if we would only put our minds to it and challenge ourselves to suggest that there are ways to accomplish things that are nontraditional. Sometimes we get stuck in the mire of having to do it this way because it is the only way it has been done. And you know what? Lewis Powell, former Chief Justice from Virginia, said, "Lawyers are uniquely trained to do what they do and because of that training, they have a responsibility to provide public service." For the time that Justice Powell was alive, there was not a lawyer in Virginia that did not believe that wholeheartedly. Justice Zlaket said that the world is changing on us, and I believe him. However, I think that we have a responsibility to maintain that level of consciousness within our profession and not worry about the nay sayers, but advance it through creative ideas and now the opportunities of technology, and if we miss ADR, shame on us.

MORRISON: Free markets really do not work without free information, and what we are seeing from a societal standpoint is the marketplace for justice is being driven by economic forces at the present time. Those economic forces have no counterbalancing public interest force that is present in the marketplace, and nobody is being forced to put that into the marketplace. I think the effort to try and get that done—to counterbalance the market forces with the public interest forces—is vitally important. This would be the one step in that direction.

RHODE: The project on which I am a consultant for the Open Society Institute would be such a step. It is at a very preliminary stage, but the general vision is that it would have a board composed of distinguished prominent lawyers and nonlawyers that would, in some general way, establish priorities. One of the threshold strategies that it might use to establish priorities would be to do the kind of survey that was done for courts that Roger Warren mentioned this morning. In addition, the board would try to develop some concrete priorities for an institution that has limited resources so that it could strategically and selectively target its activities in areas where there was real opportunity for leverage. A project that is designed, as its core mission, to increase accountability in the profession has to be especially sensitive to the accountability of its own processes in attempting to speak for the public. How exactly to do that has been a threshold challenge to those thinking about this project from the very beginning.

SAMMONS: I will be the gadfly, if you need one, at least on the part of the proposal concerning an independent public voice. I am conflicted about that. I serve on the Georgia Formal Advisory Opinion Board, and I know well that lawyers need constant reminders about our obligations to society. If we ignored those obligations, we would be even more tempted to act as a cartel

than we already are, and so, in that respect, I agree with the proposal. But there is also a concern here because there are social goods carried by the practice of law which, if you put them to a vote, would not win. I am thinking, for example, of some aspects of confidentiality and, in the worst of times, the zealous representation of guilty clients. Therefore, I do have some concerns about listening too much to an independent public voice on the topic of the regulation of the legal profession.

RHODE: Well, to be sure, I think all of us working on the project are aware that you do not conduct a popularity contest. If you put the Bill of Rights before John Q. Public, many members of the public will not like guaranteeing these rights either. So, we would not conduct a popular referendum on whether lawyers should defend unpopular clients or whether criminal defendants should have more rights or fewer rights. That would invite disaster. The people who are working on this project are well aware of the need for both an informed public and for public education about the importance of legal representation for unpopular causes and an independent judiciary. They also recognize that since most people do not take a systemic look at bar regulatory problems, you would not want just their superficial reactions to inform the oversight structure. There is a reason why we care about independence from popular pressure, and therefore, you need to build some safeguards to insure both independence and accountability.

ROB ATKINSON—Professor of Law, Florida State University College of Law:

Law as a Learned Profession

This afternoon in my talk I want to depart from my prepared paper, at least the paper I prepared back at FSU.[5] You have an abstract before you in the materials Roy sent you. Ms. Heil[6] promises you, and threatens me, that you'll soon have the whole of it in the *South Carolina Law Review*. Instead of doing the paper, I want to pick up on several threads from last evening, from our dinner and Martha Barnett's keynote address, and tie them in with my thesis in that paper—the need for lawyers to be better versed in the humanities, especially literature and history.

My wife and I sat at a table last evening with a delightful young woman—our parents and hers would say "young lady"—from Greenville, South Carolina.[7] She is a current student at the University of South Carolina

5. I composed these remarks at the Conference and added the footnotes later. Except as otherwise noted, I have not altered the substance of what I said. *Cf.* Transcript of Conference, on file with the South Carolina Law Review.

6. Caroline R. Heil, Editor in Chief, *South Carolina Law Review.*

7. Laura C. Johnson, Articles Editor, *South Carolina Law Review.*

School of Law and a recent graduate of Clemson University. I told her, more or less in jest, that this Gamecock-Tiger hybrid sounded dangerous at best.

I also told her that my mother's father went to Clemson on the eve of World War I. He left without getting a degree, in part because he was a restless—indeed, rambunctious—young man. But he also left because of what Clemson taught him—or didn't teach him. Back then Clemson was entirely military and A&M. When I was a boy working on his farm near Kingstree, South Carolina, my grandfather told me what they taught him: how to sharpen a handsaw and build a water-proof wooden box. My grandfather McIntosh died without ever reading a Platonic dialogue or a Shakespearean play. For a farmer, that's tragic; for a lawyer, it's also dangerous.

I fear that what was true of my farming grandfather on the eve of World War I is still true of all too many law students at the dawn of the twenty-first century—they haven't read any great books. Last night Martha Barnett, echoing George Santayana, said we must read history lest we repeat its mistakes.[8] I think she would agree that lawyers need to know history's heroes as well as its villains. Maybe most importantly, we need to know not to divide the world too quickly into heroes and villains, virtuous causes and vicious ones.

One of my own heroes, Woodrow Wilson, grew up on the campus of a Presbyterian seminary[9] in a house just blocks from the Roman Catholic hospital where I was born. Both buildings still stand today in Columbia, South Carolina. Wilson wasn't born in that house; he was born in a Presbyterian parsonage in Staunton, Virginia.[10] In 1858, two-year-old Woodrow moved with his family to Augusta, Georgia.[11] Not long afterward, Augusta would prove a dangerous place to be, with an invading army quite literally on the horizon.[12] But for a rather hasty and less than unheroic capitulation, the very city in which we ourselves are meeting would almost certainly have been burned as the finale of General Sherman's March to the Sea. In that war, you see, Wilson's immediate ancestors, like my remote ancestors, and many of yours, were fighting on the wrong side, under the wrong flag. In the War to End All Wars, of course, Wilson was on the right side. His Fourteen Points were the marching orders of the victorious alliance of democracies.[13] It's worth remembering, though, that it was the sophisticated Europeans who thwarted that Carolina

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8. "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, 1 LIFE OF REASON 284 (1905-06).

9. Wilson's father was a professor at Columbia Theological Seminary, which subsequently moved to Atlanta, Georgia. GEORGE C. OSBORN, WOODROW WILSON: THE EARLY YEARS 26 (1968).

10. *Id.* at 7.

11. WILLIAM BAYARD HALE, "Growing Up in Georgia," *in* WOODROW WILSON: A PROFILE 1 (Arthur S. Link ed., 1968).

12. After 1865, federal troops temporarily occupied his father's church. *See id.* at 3.

13. Wilson delivered his "Fourteen Points" address before a joint session of Congress on January 8, 1918. ARTHUR S. LINK, WILSON THE DIPLOMATIST 102 (1957) [hereinafter THE DIPLOMATIST].

boy's generous peace, and the party of Lincoln that torpedoed his post-war League of Nations.[14]

Even so, Wilson's interventionism and nation-building[15]—if you'll forgive those terms—were not wholly without fruit. I was reminded of that summer before last, teaching in Prague. As NATO bombs and missiles in Kosovo began the end of Slobovan Milosovich, I remembered that Wilson's insistence on self-determination lay behind the creation of both Yugoslavia and Czechoslovakia.[16] The grateful founders of the interwar Czechoslovak Republic named Prague's central train station for Wilson; the plaque they placed there in his honor has survived both Nazis and Communists.

When my grandfather was at Clemson, he heard a whistle-stop speech by then-candidate Wilson. When I was a boy, bird-hunting with him on his farm in Williamsburg County, South Carolina, he told me what a good speech it was. There are many, many good things to be said about Woodrow Wilson. As president of Princeton, he brought Roman Catholics and Jews onto the faculty and into the student body in unprecedented numbers for the Ivy League.[17] As governor of New Jersey, he took on Rockefellar's Standard Oil Company.[18] Perhaps most importantly, as President of the United States, he secured the appointment of Louis Brandeis, the first Jewish person to serve on the Supreme Court.[19]

But there is a dark side—maybe I should say a blind side—to Wilson as well. During his Presidency, certainly with his consent, the District of Columbia was racially segregated.[20] That's a horrible shame, one that we shouldn't let ourselves and our students forget.

Martha's comments and our student dinner companion last evening also reminded me of another of my life-long heroes, John Caldwell Calhoun. Clemson University now sits on Calhoun's farm; his son-in-law gave it to the

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14. I have revised this paragraph somewhat. Both the transcript version and my own notes reflect that I mistakenly remembered the young Wilson to have been living in Stanton, Virginia, at the time of the War.

15. In the 2000 presidential debates, President George W. Bush said "I don't think nation-building missions are worthwhile." *See* George W. Bush, Presidential Debate at Wake Forest University. (Oct. 11, 2000), *available at* http://www.issues2000.org/Celeb/George_W__Bush_Foreign_Policy.htm.

16. THE DIPLOMATIST, *supra* note 13, at 103, 117. In his Fourteen Points Wilson specifically addressed the evacuation of Russia and self-determination for the Russian people, both of which were crucial to the peace settlement. Wilson had specifically amended his Fourteen Points to recognize the new state of Czechoslovakia and endorse the breaking up of the Austro-Hungarian Empire, of which the future Yugoslavia was then a part.

17. ARTHUR S. LINK, WOODROW WILSON 32-33 (1963).

18. *Id.* at 47-48. This fight would later develop into the centerpiece of Wilson's presidential platform: fighting for the "liberation of America" and crusading against big business's control of the national government. *Id.* at 59.

19. *Id.* at 107. Winning Brandeis's confirmation was one of the hardest fought confirmation battles in the history of the United States Senate.

20. AUGUST HECKSCHER, WOODROW WILSON 290-92 (1991).

state.[21] Calhoun himself went to school out of state—to Timothy Dwight's Yale, the predecessor of the Yale Law School.[22] As Martha observed last evening, Dwight was no fan of lawyers,[23] despite the fact, as reported by Jefferson, that lawyers bulked large among the signers of his Declaration of Independence.[24] I should add that Dwight didn't like Jefferson very much, either. When Calhoun came to Yale, his Scotch-Irish Presbyterian district in South Carolina had just voted solidly for President-elect Jefferson;[25] Yale president Dwight, a staunch New England Puritan, was warning his students to bury their Bibles now that the atheist Jefferson was in the White House.[26]

A generation before Calhoun's heyday, two years before Jefferson's Declaration, Low Country South Carolinians elected an English-born Jew to their provincial assembly—the first such election, according to Abba Eban, in modern history.[27] A generation after Calhoun's heyday, then-general, future-President Grant ordered all Jews expelled from territory in Tennessee occupied by Federal troops.[28] At the same time, Judah P. Benjamin, a practicing Jew and former U.S. Senator from Louisiana, was serving as Secretary of State.[29] United States President Lincoln in Washington immediately cancelled Grant's order;[30] Confederate President Davis in Richmond appointed Benjamin to several other posts in his cabinet.[31] To overstate the obvious, history is not a simple story, and lawyers need to know its complexities, as Martha Barnett has said.

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21. *See* http://www.clemson.edu/welcome/history/index.htm (last visited May 8, 2001).

22. JOHN C. CALHOUN 2 (Margaret L. Coit ed., 1970).

23. In a speech to a graduating class at Yale, Dwight castigated lawyers for their greed and urged the graduates to avoid the practice of law like "death or infamy." Jerome J. Shestack, *President's Message: Respecting Our Profession*, ABA JOURNAL (Dec. 1997), *available at* http://www.abanet.org/journal/dec97/12PP.html.

24. Dwight's speech was delivered in July of 1776, about the same time when Jefferson hailed the great number of lawyers who signed the Declaration of Independence as "demi-gods." *Id.*

25. JOHN C. CALHOUN, *supra* note 22, at 2.

26. While serving as President of Yale, Dwight railed against Jefferson in a federalist pamphlet, claiming that if Jefferson were elected he would no doubt "destroy religion, introduce immorality and loosen all the bonds of society." Sidney Blumenthal, Lecture in American Studies, Princeton University (Nov. 9, 1999), *available at* www.princeton.edu/~ams/blum.html. Dwight was recognized as the leader of the Congregational-Federalist interests, organized to operate as a strong opposition party to the perceived anti-clerical platform set forth by the Republicans for the Jefferson campaign. KENNETH SILVERMAN, TIMOTHY DWIGHT 101 (1969).

27. Francis Salvador, a plantation owner, became the first Jew to hold state office when South Carolina proclaimed its sovereignty in 1776. He served in the Revolutionary Provincial Congress of South Carolina from 1774 to 1776. He also became the first known Jew to die in the struggle for America's independence, when he was shot and scalped in an Indian ambush after the British forces attacked Charleston in August of 1776. ABBA EBAN, HERITAGE: CIVILIZATION AND THE JEWS 266-67 (1984).

28. *Id.* at 270-71.

29. Benjamin was the first professing Jew to serve in the United States Senate. Continuing his fight for the Southern cause, he later served as the Confederate Secretary of War and Secretary of State in Jefferson Davis's cabinet. *Id.* at 270.

30. *Id.* at 271.

31. *Id.* at 270-71.

This is not, I emphasize, an apologia for the Southern Confederacy or for my native state, South Carolina. My homeland and my ancestors, to my great shame, must always bear the stigma of enslaving fellow human beings. But my homeland and my people, to my very great pride, also produced Woodrow Wilson and John C. Calhoun, and supported them and their hero, Thomas Jefferson. My thesis is simply this: We must remember both sides of all our important stories, and we must teach them to our students.

And this is emphatically not to fault our hosts for deciding to meet with us here, rather than at home. With my fellow Tallahasseean Martha Barnett, I commend them for wrestling, in the finest tradition of Western humanism, with a grave moral dilemma.

But, in closing, let me say this to all of you, particularly to Roy and to Deborah.[32] I say it with all the reverence the sacred words I am borrowing demand: Next year, my friends, next year in Carolina; next year in Columbia. In the meantime, while we're here on this side of the river, let's remember what a horrible thing prejudice is.

Please don't be prejudiced against my people.

SAMMONS: That was wonderful, Rob. I hope I do not diminish it by asking a question. This is intended to be a friendly question, but it will sound hostile. You started with the proposition that lawyers should be better versed in literature and history. The paper you said you were going to write will be about ways of doing that. My question is this: Why? Why do you want lawyers who are better versed in literature and history? What do those subjects have to do with the ordinary, every day practice of law?

I think you think it has a lot to do with it, but I want you to spell that out. Since we are both Southerners who love to talk history, let me give you an historical example of what I mean. If you drove down I-16 to get here, you passed through Blakely County, named after Chief Justice Logan Blakely, who, I think, was a man after Rob's own heart. Justice Blakely was by far the most learned lawyer in Georgia at the time, and, when he reached the bench, the most learned judge. Blakely was an autodidact, and, either because of that or despite it, his scholarship extended to many disciplines. Blakely is not remembered for his scholarship, however. Nor is he remember for his opinions from the bench. Instead, he is remembered because after the Civil War, when people wondered as they wonder now, if there were anything left of the discipline of the law, anything, that is, that had not been swallowed by the disciplines of politics or economics, Blakely stood for the proposition that the law had retained its autonomy. Through his judicial character he demonstrated that law could still be dispassionate, could strive for neutrality, and attempt to be non-political, even knowing in advance that the attempt would fail at crucial times. Now, why is Justice Blakely important to us in this context? Well, I

32. Co-hosts of the conference, Roy T. Stuckey of University of South Carolina School of Law and Deborah L. Rhode of Stanford Law School.

think he is because it is so odd that this man, the lawyer most well-versed in other disciplines, came to stand for the law's autonomy. How could he do that? Perhaps because he had a conception and understanding of our practice in which the other disciplines are essential to our own excellences. We do not have such a conception now; we live, instead, in a time when the practice is viewed primarily as technique. So, we need a Justice Blakely to come along to help us redefine our craft before what Rob asks us to do will make good sense to us. Rob, what then is the conception of practice—of ordinary, everyday practice, upon which you depend in making your proposal?

ATKINSON: I think, Jack, it is exactly the conception of the profession that you articulated earlier. That is, we have to speak out of that kind of training that makes us who we are. The sad fact, as philosophers like Alisdair McIntyre pointed out, is that by living with the conflict and disruption of lots of traditions, we really do not know who we are. We need to get back in touch with the Greco-Roman classical tradition and the Judeo-Christian religious tradition. We cannot really be the kind of lawyers you talk about—for whom the questions come already presented, if not already answered—unless we enter into a dialogue with folks like your Georgia Supreme Court justice. That is exactly what I had in mind.

W. BRADLEY WENDEL, Professor, Washington & Lee University School of Law:

I have noticed an interesting phenomenon over the course of the day and that is that people are dividing into two camps. I hope these two camps can talk to one another. The first camp says: what is really important is to focus on the reward structures and incentives that are imposed by the marketplace, law firms, and the institutional settings of the law practice. The other camp says: no, what is really important is to focus tightly on the moral dimension of lawyering and not lose sight of that. I think one thing that is very constructive about this conference is that both of those two perspectives have been brought out, and I hope what this conference can accomplish is to unify those two perspectives. I was thinking of Professor Alfieri's story about trying to do some interdisciplinary work and the philosophers banishing the law professors, saying, "No, no, no, you are just a bunch of amateurs. We are the real philosophers." The problem with having philosophers lead the charge is, without an understanding of the incentive structure that lawyers face, they have a hard time talking to lawyers about the problems that lawyers actually face and the way they ought to address them. But considering only these market approaches loses sight of the problem that we have been coming back to all day, which is: What is the right action? What is professionalism? What is the right thing for lawyers to do? What I think Jack and Rob have pointed to is that the folks doing work on that question are on the humanities side of things. They are reading literature; they are reading history; they are doing philosophy.

The source, for the answer to that question, comes out of humanity. The challenge for the humanities folks, and I put myself in that camp, is to speak to the lawyers in the language that they understand. Putting in a little plug for something we do at Washington & Lee—we have a legal ethics institute every year where we bring lawyers and judges together with a keynote speaker, who is a theoretician in legal ethics. We have had Bill Simon do it and David Rubine this year come in and do it. What is really interesting is watching the dialectics over the course of the day start to move toward convergency. The lawyers at first cannot figure out what on earth these humanities types are saying. The humanities are outraged that the lawyers just want to talk about protecting their clients, or whatever. But by the end of the day, people are figuring out that the two camps have something to say to each other. I would urge that we think, as a professionalism movement, about bringing those two perspectives together into a productive dialogue as much as possible.

W. SEABORN JONES, ESQUIRE, Immediate Past President of the National Conference of Bar Presidents and Former President of the Atlanta Bar:

Increasing the Participation of Law Schools in the Character and Fitness Aspect of Bar Admissions

Lawyers play a critical and pervasive role in our justice system, and we are not going to increase public trust and confidence in that system unless we persuade lawyers to change certain aspects of their conduct. If I were going to engage in "bar leaders speak," I would tell you I was here to exhort us all to emphasize and stress the importance of honesty and integrity in the profession. But let's speak more bluntly and deal directly with one of our basic problems—dishonest lawyers. Unless you come away from this meeting with some idea of the magnitude of that problem, then you are not going to be inspired to do that which I and others would ask you to do.

First of all, how many dishonest lawyers are there? None of us know. Judge Warren referred to the Hart survey for the ABA in 1993, in which Peter Hart revealed the public's notion that a third or more of the lawyers in the country are dishonest. That is frightening. Now that was in 1993, and do any of us think that the public's view of the situation has improved since then? We all know that the public's estimate is too high. I know and you know that the great majority of lawyers in this country are honest, hardworking people who care about their clients and represent them well. But there are a number of outright dishonest lawyers out there. Back at the time of the Hart survey, some suggested that the correct percentage might be in the five to ten percent range, but certainly not one-third. Now think for a minute. In 1972 there were 320,000 lawyers in the country. In 1997, the latest Department of Labor statistics I have showed that there were 965,000 lawyers. So, if we were to say that ten percent of the total number of lawyers in the country are dishonest, it has gone up from 32,000 to 96,000 in twenty-five years, and the population of

the United States has not increased nearly so much in that same period of time. So there is all the more opportunity for members of the public to have rubbed shoulders with, been represented by, or seen discussed in the media—dishonest lawyers.

It seems to me that we have a failure in our recent surveys. I can understand why that is, and you probably can too. There has not been a really candid survey about lawyers sent out to the public since that Hart survey. The ABA, lawyers, and bar leaders, in general, did not like what they read in that survey. So, they have not wanted to ask so many questions about what the public really thinks about lawyers since. If any of you have any hard information about just what the real percentage of dishonest lawyers is, I would like to know. However, you know it would be hard to calculate because I suspect that most of the dishonesty that is practiced upon the American public is practiced upon the elderly and the unsophisticated—the people who are the least likely to catch lawyers at it. It is not just outright dishonest "bad lawyers" that are our problem. We have also got a problem with "good lawyers" who sometimes slip into a certain level of dishonesty without wanting to admit it. The rules have just changed, you see, and we are forced to do things as our opponents are doing them. I do not believe that is lost on the public, which is more savvy than we like to give them credit for.

Now, before I go into what I would ask of those here who represent law schools, let me acknowledge the failure of bar leadership to do much about practical reform of lawyer behavior. It is anathema to bar leaders. We do not like to discuss it. Our constituents did not elect us to bar presidencies to talk about what lawyers are doing wrong. Instead, it is our job to fend off criticisms of lawyers and to persuade any who will listen that those criticisms are invalid.

The second failure that I would point out to you is a failure of the judiciary. I recently had the pleasure of appearing on a panel program with Judge Ramsey in Atlanta for the National Association for Court Management. I asked, in the course of that session, about three hundred to four hundred court managers and administrators how many had heard their judges speak to public groups. About two-thirds of the people raised their hands. I then asked how many of those court managers had heard their judges say to the public something like this: "If you have got a litigation matter, you shouldn't go out and hire that mean lawyer, that Rambo type lawyer, to represent you. You shouldn't come into my court thinking that you can hide the ball or depart from the truth and expect to get a good result, because that sort of behavior will be punished in my court, not rewarded." One hand went up. So we have a failure in that respect with the judiciary.

Here is what I ask of you at law schools, and it is hard to argue with what Professor Green said: that our bar examinations, character and fitness examinations, and disciplinary processes in the practice are not perfect and do not work well sometimes, but, until we have better mechanisms for insuring the high standards of the lawyers who are going to practice, we have got to do the best we can with what we have got. What I urge you to do in law schools is to

inform entering law students, even before they get there, that you require of your students the highest standards of honesty, integrity, and that you expect them to conduct themselves that way throughout their law school experience. You do not just teach ethics; you practice them as well. Emphasize that your students' adherence to your honor code is required, and explain how seriously the law school will take such offenses as plagiarism, falsification of resumes, etc. But there is no good in putting this out if you are not going to practice it. You can teach all the ethics you want, but if your own disciplinary process is lenient and inconsistent, I suspect that the lesson your students will take away from law school is that ethics are preached but not practiced.

There is a concern for the individual that we can all understand. When it comes to honor code violation situations, I am afraid that the concern for the individual often outweighs the concern for the system, the public, and the profession. We understand your dilemma. Young people make mistakes, and you are compassionate people in law school. Your tendency is to forgive and let them move on into the system.

Law schools need to cooperate more with bar examiners and character and fitness people. I have talked to people on both sides, and it is apparent what the problems are. There is a failure to communicate. There is a lack of trust. The people in the law schools are concerned that those at the bar examiner's office are going to do things that are unwarranted. They are also concerned that if they turn students in or make unfavorable reports about their students, it reflects upon the school. There is concern about lawsuits. The solution to those problems is for you all to get together and spend as much time as it takes to work out the best possible system that allows you to report that which should be reported to bar admissions; to trust each other; and to identify what should be reported, and what should not be, and spend some effort on that kind of process. We cannot continue to do what we have been doing. I fear our biggest problem is just that we do not want to be involved. None of us—whether we are lawyers, or law faculty—want to stick our necks out. Before this session, one of my law faculty friends, Jack Sammons, said to me, "Well, you know if we really wanted to be involved—I think he said this tongue in cheek—we wouldn't be teaching in law school," but I do not believe that. I believe that you care as much about the profession and the justice system as the judiciary and the practicing bar, and we can and must work together to improve the situation.

RHODE: It is agonizing to have to be the time keeper under these circumstances because everyone could continue on these issues at great length. But, given my unenviable role, I invite any very brief reflections. So, thoughts about that last comment are welcome. If there are none, we can assume universal acclamation because it is hard to disagree with many of those good ideas.

RAMSEY: A lot of ideas are good, but I want to say that there are difficulties with implementing that program, and that is why I responded when you said that there was universal acclamation of those ideas, as if there are no problems, because there are. One major problem is the same as is reflected in the lawyers: the legal profession's commitment to confidentiality. No one would say, "Look, any time you lawyers have information about bad things come to your attention, you ought to report it." They say, "No, you cannot do that because confidentiality serves certain values." Law teachers serve as counselors. They serve as an ear for a troubled student to come in. It presents a problem if the law teacher or dean then says, if it turns out that your "problem" reflects on your character and fitness, I am going to call up the bar examiners and let them know. I am oversimplifying it just to make a point. There are other areas where there are issues. I am not saying that the proposal is one that needs to be rejected or does not have a great deal of merit. I am just telling you that there are significant issues that would have to be resolved in order to implement that program. Therefore, the idea that there is universal acclamation and support is a bit of an overstatement.

RHODE: Certainly you are right for the correction. As somebody who has written very critically about the moral character process over the years, I am sensitive to the long list of implementation issues that would need to be addressed. I meant only that there is universal acclamation at a general level of working together to think creatively among legal educators, the bench, and the bar on all those issues and to take seriously the charge to law schools to assist that process.

WARREN: Could I just expand on Henry's point a little bit? Earlier there was talk about carrots and sticks. I think there is a broader point here which is a good one, namely that there is a middle ground between incentives and sanctions. There are activities like coaching and mentoring. There is a lot of legitimate criticism of trial judges who are not reporting deficient lawyers to the bar. Yet, I was a trial judge for twenty years, and I do not think I ever reported a lawyer to the bar. Was that because I never witnessed unprofessional conduct? No. But I thought the bar disciplinary process was a little ineffective from my perspective. If I had a mechanism where I could have gotten a lawyer some type of mentor—the kind of thing any progressive employer would do for an employee rather than terminating the employee—it would have been very helpful, and I think that is Henry's point in the law student context.

RHODE: I think that is right, and part of the reason judges do not report misconduct is because they are skeptical that minor problems are going to result in any disciplinary action. Most disciplinary agencies are woefully understaffed and most define their jurisdiction so that a lot falls through the cracks. Disciplinary agencies, for their part, respond, "Well, we do not get referrals from judges, so therein lies the problem and the challenge." We do

not really provide any rewards for judges who report misconduct. Too often there is a "shoot the messenger" response by the bar. So we need to think more carefully about how to structure the incentives for judges. And the same could be said about the character-screening process.

MORRISON: The halfway-house idea that was just raised is some kind of help. I will peel back one more layer of my personal experience. I am an old trial lawyer myself. I have tried over 240 cases to jury verdict. In that context, the first one hundred or so cases I tried, the judge called the senior partners of the law firm when the case was over and reported on how I had done—whether I won the case or not. Moreover, if I was obnoxious at a deposition, I could count on hearing about it from my senior partners. The halfway house for the lawyer after law school is, I believe, what Nathan Crystal said—the law firm. That is where we can change behaviors. I do not know where it is in the law school, but I sure do like the idea.

PETER A. JOY, Professor, Washington University School of Law, St. Louis:

A Proposed Professionalism Creed for Judges

The title of my presentation is "A Professionalism Creed for Judges: Leading by Example." Several of the presenters and commentators today, starting to some extent with the remarks by President Barnett last night, have touched upon this theme. My thesis is that the professionalism debate needs to focus more on the judiciary—the lawyers who serve as judges. Justice Zlaket's comment that some judges believe that once they put on judicial robes they are no longer lawyers reflects the fact that too often the professionalism discussions are one dimensional. We focus on lawyers, and sometimes broaden the discussion to talk about lawyer training in law schools, but we expect too little from the judiciary. The concept that judges have a role that is more than one of an enforcer of lawyer professionalism is conspicuously missing in most professionalism creeds and in the speeches and articles by bar leaders and commentators. Judges have an important role to play in monitoring themselves, as well as lawyers. Judges also must work to raise the level of professionalism among themselves. If we are ever going to make significant headway in raising the level of professionalism among lawyers, judges must lead the professionalism movement by example.

There are three questions I would like to pursue in the remaining seven and a half minutes. First, why is there such a singular focus on lawyers in the professionalism debate? Second, is that singular focus on lawyers appropriate? Third, what types of meaningful initiatives should the judiciary adopt for themselves? In other words, what is to be done?

I use the phrase "what is to be done" because we are not only talking, as Judge Warren indicated earlier, about steps toward meaningful reforms in the legal profession. When we talk about legal professionalism, reforms are not

enough. When we talk about professionalism, we are talking to some extent about the need for revolution.

A revolution of sorts is necessary for us to create the type of ideal legal system we would all like to see, and one that I know Deborah Rhode firmly believes in. In the ideal legal system there is a lawyer for every person who needs one, and every lawyer provides some pro bono assistance to those with legal needs who cannot afford to hire an attorney. If you do the math, it is easy to see that, with approximately one million lawyers, we have roughly one lawyer for every 275 people in the United States. Unfortunately, it breaks down in reality to about five lawyers for every one rich person, and about one lawyer for every 10,000 poor people. As Deborah mentioned earlier, and as anyone who has read her work knows, rather than being a leader in providing legal services, the United States is actually least among industrialized nations in making legal services available. Legal services for the poor in this country are like the infant mortality rates in inner cities across the United States—a crisis for the poor.

In terms of the first question about the singular focus on lawyers, it is easy to see that some of the focus reflects the distress the public feels about lawyers. There are too many lawyers motivated by their own personal financial gain and not by a sense that lawyers have a responsibilty to make legal services available to those in need. The public perceives lawyers as manipulating the legal system not only to help their clients but also to help themselves. This view is reinforced by what is today a politically-correct view that lawyers are absolutely fair game for every type of joke that cannot be told about almost every other group of people in our country. Furthermore, there is no special protection for lawyers. As lawyers, we have certain limitations on what we can say about judges and the judiciary. There are no limits on what people can and do say about lawyers.

In terms of the second question, is this singular focus on lawyers appropriate, the answer is no. The justice system in our country relies, in large part, on a fiction. The fiction maintains that all judges have the requisite skill level, competencies both in substantive law and in the rules of evidence, and are always fair and impartial. Unfortunately, that is not true. Justice Zlaket said that he has found "too many judges focused more on keeping their jobs rather than doing their jobs." That mentality creates conditions for injustice in those courtrooms.

Judges are often in the forefront of professionalism efforts. Privately, however, the same judicial leaders often confess that they have little influence over other judges and that some of the other judges are not models of professionalism. Again, loosely quoting Justice Zlaket, "Judges are a difficult bunch of people to ride herd over." In my own experiences as a lawyer, and as I continue to go to court with the clinical students I teach, I see some judges running their courtrooms along the lines of a feudal system with the courtrooms being their fiefdoms. Too often judges cannot agree among themselves to adopt uniform local court rules. In those courts where this gridlock occurs, every

judge does whatever he or she wants in his or her own particular way. Steve Morrison described the result, which is a legal system where there is little predictability. Lawyers cannot predict what particular judges are going to do, and too often lawyers are unable to provide clients with meaningful information upon which to make litigation decisions.

The singular focus on lawyers is also inappropriate in terms of public perceptions. A 1999 survey by the National Center for State Courts indicates that citizens' trust in the courts lags behind confidence ratings of other institutions, including state governors, legislators, and the police. Some of the specific findings show that eighty percent of the public believe that wealthy persons receive better treatment from the courts than others, and nearly fifty percent believe that minorities and persons who do not speak English receive the worst treatment. The good news is that seventy-nine percent believe that judges are generally honest and fair in deciding cases, but the bad news is that eighty-one percent agree that politics influence judges in their decisions. If you look at individual state surveys of judges and the courts, you will find similar opinions. In survey after survey, only fifteen to twenty-five percent of those responding indicate that they have a great deal of confidence or are extremely confident in their courts.

I am running to the end of my time, so I will move on to the third point—which contains some concrete proposals. First, there is absolutely no excuse why the newly amended Canon 3 of the ABA Model Code of Judicial Conduct has not been implemented by the high courts in the states where judges are elected. Canon 3 has been amended to provide for specific recusal requirements when an elected judge presides over cases involving lawyers or parties who made substantial campaign contributions to the judge. I hope somebody can tell me that I am wrong, but not a single state has adopted that modification of Canon 3. Canon 3 addresses not only the perception of fairness, but, in reality, quite often fairness itself. It is time for the state supreme courts to address this issue.

Second, the prohibition against ex parte communications is rarely followed by many judges, particularly at the trial level. Unless the rule prohibiting ex parte communications is toughened, the situation will not improve. One way of making the ex parte rule better would be to require judges to notify all other parties or their counsel of the substance of each and every ex parte communication that takes place within seventy-two hours of the communication.

The third and final point is one that Fabio Diminich commented upon earlier—we need to monitor judges' records on professionalism and also reward them. The reward, in the form of some form of recognition for judges who are models of professionalism, would be "the carrot." State high courts should monitor data on judges reporting ethical misconduct of lawyers appearing before them. There also need to be performance surveys by lawyers and court personnel. I like Fabio's suggestion that the parties and witnesses appearing before judges should also complete surveys. Judges with

significantly low approval ratings would experience "a stick" of sorts by receiving a communication from the state high court. If a judge consistently receives low approval ratings, then perhaps a mentor or peer counseling program will be necessary.

I should end now and leave some time for comments.

RHODE: I will just echo that suggestion. It seems clear from the papers and comments here that there is not enough interchange between the law schools and the courts. It is important to remind courts of how important it is for them to take institutional responsibility for addressing issues of professional regulation. It is too easy for judges to take responsibility only for their own conduct and not for the performance of the system as a whole. On that note I should, however, add that Justice Zlaket is a stunning exception.

CHIEF JUSTICE THOMAS A. ZLAKET:

National Bar Presidents' Project to Improve Honesty of Lawyers

Well, Peter I could not agree more with you and that is why I did not challenge anything you said. Ten minutes, huh? Here we go. Very quickly, we have heard people talk about surveying the public. There is no need to survey the public anymore. We have done it ad nauseum. The Hearst Corporation did it. The ABA's done it. Every state has done it. We have had public summits. We have had three of them in Arizona, and we know what the public thinks about us, and we know what the public thinks about lawyers. So, why do we not cut right to the chase?

The public believes that lawyers are major players in the justice system. Therefore, it is extremely clear that whatever the public thinks about lawyers rubs off on the entire system of justice in America, and the public thinks that lawyers do not tell the truth. How many of you saw the movie, *Liar, Liar*? Has anybody in the room seen *Liar, Liar*, about the lawyer who had to tell the truth? What made that movie so funny? Was it that the people out there who paid good money to see it believed the underlying premise, that lawyers lie and that it would be an uncomfortable situation if a lawyer had to tell the truth? How about the joke: "How can you tell when a lawyer's lying? When his lips are moving." What makes that funny? If you said that about a doctor, would anybody laugh? If you said that about a dentist, would anybody laugh? No, it is funny because people think lawyers lie. So let me tell you about a project that we now have with the help of the Open Society. A small grant is enabling a group of concerned folks to get together—a group that came out of the National Conference of Bar Presidents. We have now met several times; we have another meeting coming up to talk about the subject of lawyers and the truth. Think about our profession, yours and mine. We are a profession that claims to be truth-seekers, that says we are out to find truth and justice. We make those who appear in our courtrooms stand up, hold up their right hands

and say, "I swear to tell the truth, the whole truth, and nothing but the truth." But do we insist on truth from our own colleagues, from members of our profession? I submit to you the answer is no.

The public, according to all the surveys, does not trust the legal profession, and maybe there is a good reason for it. We do not trust ourselves. The first fifteen years of my law practice I never confirmed a telephone conversation with another lawyer in writing—never once, and I was never once burned by a lawyer going back on his or her word. The last twelve years that I practiced law, I confirmed everything in writing. I used to confirm dinner engagements at my mother's house in writing for fear that she would send me back one of those letters that distorted the phone conversation we had. How many of you now hear lawyers say, "I confirm everything in writing"? And how many of you teach young lawyers that it is malpractice if they do not confirm a conversation in writing? Tell me what that says about us, our word, our honor, our ability to tell the truth, and be known for our integrity or lack of it. Do lawyers lie? We sat down in Tucson, Arizona, this very small group, and spent an afternoon ticking off the areas in which lawyers are not exactly known for telling the truth.

How about billable hours? Do you think it is really possible to honestly bill 1800, 1900, 2000, 2200 hours a year? How many hours would you have to spend in the office to put down eight honest billable hours a day? Do you think that some lawyers are exaggerating the work they are doing when, at the end of the day, they look at the time sheet and say, "My God, I didn't get my billable hour quota today"? Do you think lawyers have any incentive to craft ten, fifteen, or twenty perfect interrogatories that go right to the heart of the case, rather than one, two, or three hundred interrogatories denominated "first set"? Do you think lawyers have any incentive to take thirty minute depositions instead of three-hour, four-hour, or six-hour depositions? And, do you think such distortions are going on every day in our profession?

How about continuances? The phone call to the other lawyer, or worse yet, to the judge when a lawyer is suddenly caught short and realizes that he or she is not prepared: "I need a postponement. I have had a personal crisis in the family. Had a death in the family. Something's happened. One of my children is very sick. I need a postponement of this case."

How about discovery and disclosure, maybe the most fertile field for the imagination of lawyers? We like to call it "zealous advocacy." It is lying; that is what it is. You can call it what you want, but distortion, obfuscation, the effort to hide and conceal and destroy, and make "A" look like "B," it is not telling the truth. Yet, lawyers do it every day and justify it in the name of "zealous advocacy." Two words I have come to hate. Two words that should have been removed from the Code that governs lawyers' conduct years ago. Some bar associations have removed those two words because they have been so bastardized by our profession over the years—twisted and distorted—that they have been used to justify every possible atrocity you can imagine.

How about misstating the record? The lawyer that stands in front of the court and deliberately misstates the record? I see a lot of that. How about the lawyer that miscites cases? "Your Honor, you ought to read the case of *Jones v. Smith.*" I want to say to the lawyer, "I am relying on you to tell me the truth, to cooperate, because I need you. You are an officer of the court." How about the lawyer that deliberately does not cite those cases that are against him or her because "I owe it to my client." How about the lawyer that sends written confirmation of the phone call and distorts what the conversation actually was? The deception goes on and on. It goes on in lawyer advertising. It goes on in so many ways. We sat for a whole day and worked up a list, and if I had time to go through the whole list, you would be shocked. It is shocking.

We believe in this small group that a core value of this profession is truth; and that in order to restore any sense of honor, dignity, and public respect for lawyers, we must be the profession that is known as the "truth-tellers." That is our mission. Ethical rule number one should read: "A lawyer should not lie." Period. No situational ethics here. Do not tell me "a lawyer should not lie, *except* . . . ." That is what you will see in the present code and that is what you will see in everything that has been written about it.

Deborah has a colleague named William Simon, and he has written an article on "virtuous lying," in which he makes an effort to justify some distortions. There are other articles on the subject. But many of us believe that good advocacy does not mean lying.

"The truth-tellers." Some of you are already looking skeptical. Every time I talk about this, I hear the same thing. "Look, the whole world lies." Your car dealer lies, your plumber lies, the guy that fixes your appliances lies. Everybody lies. The marketplace lies. So, what is wrong with lawyers lying? Because lawyers *are* and should be different! When we finally realize, and make others realize that lawyers are and should be truth-tellers, different because of who we are and what we do, then we will have a chance of gaining the public's faith and confidence. I think we will not need so many professionalism conferences after that.

Lying is corrosive. It corrodes the individual lawyer, and it corrodes the profession. The lawyer who lies every day pretty soon does not know if he or she is lying to a spouse, to a friend, or to everybody else. In the process, this profession goes down and down and down because the public thinks we are a bunch of liars.

Thanks.

RHODE: What I am burning to know is how are you going to fix this? You have the right diagnosis here.

ZLAKET: I know that it is going to be very hard to enforce this because it is easy to simply say "How do we catch people lying?" But to me, that is not a reason not to try. I think if we were to go to Ethics 2000 today and say, "We want ethical rule number one to read, 'A lawyer shall not lie, and if a lawyer

lies there should be serious consequences,'" they would laugh us out of the room. But I still think it is worth trying. It is worth doing because as long as we close our eyes to it and try to justify it in a situational way—"a lawyer should not lie, *except* . . .," I think we are doomed. I have no good answer to your question, except to try.

ATKINSON: I want to speak on behalf, by proxy of Deborah and many other folks here, of my good friend, Bill Simon, whose piece on "virtuous lying" I very much like. I will be very brief. I think Bill, along with me and probably lots of others, are very fond of truth, yet, we would not make "tell the truth" the number one canon of lawyers. Instead, we would make it—"do justice." Let me give you one fictitious situation and a couple of other factual situations to suggest why.

Bill Simon, Tom Shaffer, and other legal commentators have noted that at the very end of virtually everyone's favorite book about lawyers, *To Kill a Mockingbird*, there is a problem about who killed the evil Robert E. Lee Ewell. The real killer was the recluse, Boo Radley. But the hero lawyer, Atticus Finch, is brought to realize that if the town comes to know that, then Boo Radley's life will be destroyed. So, conniving with the sheriff, Atticus Finch decides to tell a lie. The lie is that Robert E. Lee Ewell fell on his own knife. He did not. I maintain, and popular culture and America's lawyers maintain, that the lie was the right thing. My factual situations are much grimmer. I hope, in all earnest, that none of us find ourselves anything like them. But if the Nazis are ever at the door, or the Serbian storm troopers in either Kosovo or Bosnia, or, not so long ago, if you had runaway slaves in your basement, and you are asked by the proper authorities under the constitutional fugitive slave law, "Are there any Jews, Albanians, or blacks hiding in your house?" The right answer is: "No." And the right answer is: "No," *especially* if there are Jews, slaves, or Albanians hiding in the basement.

WENDEL: I have got a couple of points. I will be really quick; I promise you. First, I want to echo Rob's comments about the diversity of values that lawyers are supposed to protect. I think Jack said it earlier, and that I agree with, which is that the complexity is the point. If you try to simplify and make one single master value the whole point of the legal profession, it misses a lot of important features of what makes lawyers distinctive. I think Rob's example of Atticus Finch is right. But the other question I had on implementation comes out of the paper I most wish I had written, which is Pat Schultz's piece called *How to be an Unethical Lawyer in an Unethical Profession* or something like that. He was asking the question which is: "How do these idealistic law students who stood before you and said I am idealistic, how do they become these lying, document destroying, billable hour padding lawyers, that we all observed?" What happens with the nature of the process? In addition, Schultz's claim, which I think is right, and I am a former big firm lawyer, is that big firm culture habituates you gradually to cutting corners here and there until before

you know it, you are telling huge lies, and your moral radar has just stopped working. The culture of big law firms encourages you to cut corners in a myriad of ways: the billable hour pressure being primary among them, but also discovery practice, in which associates are encouraged by partners to keep documents out of production by any means they can. Partners will send back discovery responses, "Are you sure this is responsive?" The associate looks at him, "Oh, gosh, I guess not," and they gradually learn to lie. I think the most intractable problem in legal ethics, and how these idealistic law students end up as lying lawyers, is figuring out how to deal with the cultural law firms that gradually desensitize us to our own lying.

RAMSEY: As a member of Ethics 2000, since it was mentioned, I do not think we would have laughed you out of the room, Chief Justice. We have, in our draft, attempted to strengthen and support the view that lawyers should not mislead, and I use that phrase deliberately because I want to go beyond the term "lied." You should not only not lie, but you should not mislead tribunals, and you should not lie to or mislead each other. You should not lie to or mislead third parties. But as has already been made known just a moment ago, there are complications around the edges of those principles, and there are circumstances under which it is not so clear that you should not lie or mislead. Another area, not only to protect the lives of people under circumstances where we would all agree it is necessary, is, for example, the question of whether you should collaborate with clients in doing testing situations to discover corruption, or to discover unlawful discrimination, where people go and present themselves as people seeking an apartment. They are lying. They are not there to seek an apartment. They are there to find out if you are preventing people from getting an apartment on an inappropriate ground. But, on the simple issue, I do not think there is any doubt that we will suggest that our rules, at least the rules as they presently exist and the rules in this area as they will be, should be modified, to state that lawyers should not lie or mislead tribunals. Lawyers should not lie or mislead their colleagues or opposing counsel, and lawyers should not lie or mislead third parties. But I do not think you can get around that there are some exceptions. As to whether we would define that as lying, I do not know, but it is doggone sure misleading and it is not a truthful statement that you make.

RHODE: We will give you the brief last word.

ZLAKET: Judge, I appreciate your position, and I know what you are saying. I would point out that I am now collecting the oaths of offices of lawyers from every state in the union. Many of us held up our hands and said that we would not lie or mislead, in so many words. This example, about the Nazis at the door, is very similar to the rather hysterical example that was advanced in the article by Professor Simon. The problem is that it bears little relation to the problems that lawyers face day-in and day-out. The minute you

start carving out exceptions, the minute you say to lawyers who are bright, articulate advocates in an adversary system that there can be exceptions, you can kiss the rule goodbye. Anybody that has been around lawyers for any length of time knows that they will try to carve out exceptions to justify a particular falsehood that was utilized in the combat of the day. I understand that life is not perfect, and I am not sanctimonious. I have told lies. I just think they contribute to an overall lack of respect for the profession and the justice system.

MORRISON: Deborah, I feel like I need to respond to one thing about the corrosion in large law firms just by the nature of the firm being large. That is a myth. That is a lie. It does not really exist, and some of the largest law firms in the country that I have had the privilege to hire and engage in have been the ones who have come with the highly negative news that you have done something wrong; you need to resolve the case; you owe somebody something that you wish you did not owe them; or you have to produce a document that you wish you did not have to produce. Somehow, somewhere those lawyers in those large law firms, and I believe in my large firm, have learned that the justice system is a very, very high priority. When you are called upon to produce something that is uncomfortable to produce, you produce it. You do not hide it. I think many, many lawyers across the country do that on a daily basis. In fact, the ethic of my own personal law firm is that we never have tried a case without bad documents that we produced. That just does not happen.

RHODE: Well, there is complexity here. While Chris is coming to the podium, I am going to let Jack speak to that complexity.

SAMMONS: Well, that actually was not what I was thinking about, Deborah, but I guess this will be close enough. I may surprise Brad and Rob here because I think lawyers have a unique obligation towards honesty, one that is far more demanding than the honesty of ordinary morality. In other words, if Rob's Nazis were at the door of a lawyer and the conversations with them were part of the legal conversation, then Kant got the answer right. The reasons for this, however, are not Kant's reasons. The primary reason is that dishonesty is more destructive of the quality of the legal conversation than anything else, and the quality of that conversation is the primary good carried by our practice. In other words, honesty is a constitutive rule of our practice; we do not have a practice without it. When we are dishonest, we foul our own nest. Having said this, I also think, perhaps contrary to the good Chief Justice Zlaket, that most of the rules governing lawyers already reflect this elevation of honesty above justice, as Rob might say it. The rules are rather rigid, are they not, on the subject of lying about brute facts? What observers do not seem to understand, however, is that this requirement of honesty does not mean that we are required to be forthcoming. A requirement of being forthcoming, if there were to be one, would have to do more with Rob's justice than it would

with honesty. Relatedly, this requirement does not mean that we have the single value of truth as the objective of the legal conversation; in fact, it is a reflection of the fact that this is not so. There is nothing the Judge has said, for example, that would prevent me from forcefully making an argument that I did not believe should prevail or even be persuasive. This is true, of course, because I am making the argument for another within the framework of a particular social conversation in which the participation of others through me is essential to its meaning. To do this is not lying. It is not even deceptive, properly understood. Yet, given what the Chief Justice Zlaket has said, and putting with that Rob's comments about justice, some people can get very confused about this.

Good lawyers learn a lawyer's honesty, which is a certain practical wisdom that requires them to make fine and difficult distinctions. This is a very demanding virtue; it is far more demanding, as a matter of character, than the virtue of honesty of ordinary morality. These are, for lawyers, very difficult ethical waters to navigate, but I see them sailing along very well all the time. When we can get a clearer sense of this, a clearer appreciation of a good lawyer's honesty, I think we can then, and only then, begin to respond as a practice to Justice Zlaket's concerns.

RHODE: These conversations are always a reminder that "God is in the details." It is easy to talk about the extremes. Most of the challenges lie somewhere in the middle.

CHRISTOPER J. WHELAN, Associate Director, International Law Programs, University of Oxford:

A British Perspective on the American Advocacy System (A Call for More Pursuit of Truth and Less Pursuit of Winning)

Thank you very much. I am Chris Whelan from the University of Oxford. I am very grateful to be here because what I am going to say has been heavily influenced by some of the people in this audience. The American writing on professional responsibility is by far the best and the most interesting. Indeed, I probably know much more about Chicago and the Chicago Bar than I do about England and Wales!

The correct title of my paper is *Anything But the Truth*, as in terms of the witness telling the truth, the whole truth, and anything but the truth. What I would like to do in the time available is present one or two points from a rather long and complex analysis of how lawyers in the United States and in the United Kingdom interpret their sometimes conflicting professional duties to the client, the court, and the administration of justice. I would like to add two more "c" words to this conference title: comparison and culture. By culture, I do not mean British culture compared with American culture, but professional culture. And why a comparison? Well I think comparison is justified because arguably

the Anglo-American legal system and the Anglo-American legal profession are sufficiently similar to justify it. Both operate in very competitive contexts in the market place: the structure and organization of the profession are very similar; the adversarial system, the ethic of the adversarial system and the professional rules are actually very similar; as are the ways of delivering legal services. They are all more alike than different. Certainly lawyer jokes are very similar. I have been encouraged to tell one now which is: What is the difference between a lawyer and a slide projector? The answer is a slide projector has a mind of its own, as obviously we have seen today.

In fact, minds and independence are two things that I want to come back to in my talk. A comparison may shed light on two very closely-related issues. First of all, how is professionalism defined by lawyers? And, secondly, why? If we can better understand these two issues, then we may be able to influence behavior and enhance the professionalism of lawyers.

So what does the comparitivist observe? First, about the definition of professionalism, I think it is quite clear from what we have heard today that if we ask the question, "What does it mean to be a professional?" or, if you want to put it slightly differently, "What should lawyers do?", the typical American practicing lawyer's approach would be client-centered, zealous advocacy; partisanship; and neutrality. Very powerful justifications for that approach would be given by the American lawyer. Certainly people like Monroe Freedman and Bill Hodes endorse the view that the traditional ethic of the American lawyer is to give entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of the lawyer's utmost learning and ability. Zealousness is claimed as *the* fundamental principle of the law of lawyering. And indeed for Monroe Freedman there is an ethical danger in civility and in professionalism.

The distinctive response to the American lawyer in most conflict situations—that is conflict between duty to client and to court—is to go with the client. This is not just in the criminal paradigm, where there is a powerful justification. It is in the civil paradigm, too, and not just in personal injury where you have the powerful insurance company against the individual. Arguably, too, it is in the family paradigm where you have got two individuals and even in the negotiation and bargaining scenarios where power is all over the place.

By contrast, in England and Wales the approach is significantly modified. Although a professional person's first and particular duty is to his or her client, and for lawyers this professional duty of maintaining a client's interest is paramount, it is subject to the lawyer's direct responsibility to the court and to the administration of justice, including very often, to the other side. Lawyers are a means to an end, yet that end is not exclusively the client's but also includes achieving the goals of the legal system and of the law. Now, of course, we know that the American rules are similar. The model rules and the model code are very similar: The American lawyer, too, is an officer of the court. But the professional culture, arguably, is very different. The instinctive response

of the English barrister, for example, in most conflict situations, and this, of course, will be in litigation and advocacy where barristers do most of their work, is very different. This is so despite a very competitive environment and despite the adversarial ethic.

Barristers get embarrassed very easily. Now you may say that is a bit surprising for a profession that goes to work in horse hair wigs and black funeral gowns—getting embarrassed is not what you would think they would do. But, no, barristers get easily, professionally embarrassed. They get put in the position where their duties to the client conflict with their overriding duty to the court and to the administration of justice. How do they resolve it? The answer is that they have a culture—a professional culture, a community context, a collective norm—in short an independence, which empowers individual barristers to do the right thing, driven by what Michael Burrage has termed as an extremely high standard of honor.

Well, what lessons can we learn from this? What, for example, is doing the right thing? What is professionalism? The answer is, I do not know; it all depends. I know that this is going to sound a bit naive, but barristers *know* what the right thing to do is. In the real world of ethical dilemmas, matters are grey; they are difficult and complex. There are honest differences of opinion about what the right course of action is. As one court of appeals judge in the United Kingdom put it, "Counsel would know intuitively and instinctively if the course of action felt wrong and should not be followed." In other words, the judge trusted the lawyer and had confidence in the decision being made.

Now that sounds a bit like a personal ethic. Maybe it sounds a bit like Bill Simons' ethical discretion in lawyering. I do not think it is either of those two things. I think it is actually the exercise of professional judgment: making choices and decisions in very difficult and complex areas so that the decision is guided not exclusively by money and self interest, not exclusively by what the client wants, but by this professional ethic.

The second part that I will touch on very briefly is: How do you achieve this? Assuming that the exercise of professional judgment produces outcomes that we in this audience think desirable, how do you actually achieve it? I will give you one quote and I will finish with two quick points. The quote is from Roscoe Pound who captures the idea. Roscoe Pound said, "In order to further justice, in order to ensure that the machinery of justice is not *perverted*, those who operate the machinery must know, must not merely *know* how to *operate* it, but they must have a *deep sense of things that are done and things that are not done*." Roscoe Pound goes on to speak about the professional spirit.

This gives us a clue, it sounds a bit naive, but it gives us a clue because empirically, barristers do exercise a spirit and a professional judgment. They do not mislead the court; they do not take unfair advantage. You might say that is because they are socialized, and they work together in Inns of Court. Well, yes, that is true, but others do it as well. There are now solicitor advocates in England, as well as barristers; they are subject to the same professional norms. In rural Missouri, too, according to Donald Landon, lawyers operate a

professional ethic which is not based on a rule of zealous advocacy but on a shared professional community. Criminal defense lawyers probably share a strong professional norm about what they should do in conflict situations. The Association of Professional Responsibility Lawyers in the United States do the same, and there are other examples.

I will draw to a close. The lesson is that one size does not fit all. There are different hemispheres of legal practice. Professional norms should be contextual, recognizing the heterogeneity, fragmentation, and diversity of legal practice. Some lawyers have no contact with other lawyers. I think that the professional norms which each lawyer should ascribe to have to be located in the context in which they work. I will leave it there.

RHODE: That was an important reminder that across different contexts and different cultures there are shared ideals, norms, and values. While Bruce is coming to the podium, we have enough time for people to make a brief comment.

RAMSEY: This last presentation just underscores for me something that we have not focused on today. Something we have focused on is the lawyer as advocate. We have not spoken very much about the lawyer as counselor to the client. Now you do not just walk into a lawyer/client relationship and say, "Tell me what to do, and point me in the direction you want me to go." The lawyer has a powerful responsibility to discuss with the client the propriety of what the client wants to do and the propriety of the mechanism that the client wants to use, and say to a client, "That is inappropriate," and, in the bottom line, say, "I will not do that."

RHODE: I hate having brought Bruce here for only this brief moment, but I encourage people to continue their conversation with him at the reception and by e-mail. He is accessible and wonderfully thoughtful on these issues, as I know having been enriched by his work for decades.

GREEN: Thank you. When Roy and Deborah announced that they were planning this conference I very much wanted to participate. Roy said the price of admission was a proposal for a new initiative, so I fired one off. It was about three sentences long, and he said, "Well okay, you have paid your dues, you can come." Now, he did not say an original initiative; he just said a new one, and so I feel comfortable being here. I am the last speaker before we get to the conclusions, and because I am a New Yorker, I have baseball very much on my mind. This is a very resonant moment for me because it reminds me of my many years growing up saying, "I want to get in the game, I want to get in the game." When I finally got in the game I was assigned to bat ninth, and I always managed to live up to people's expectations. I hope, Deborah and Roy, I manage to live up to yours as well.

I want to present my three sentence proposal, but before I get to that, I want to dissent from the notion that twelve-year-olds have nothing to offer. Actually I cannot really speak to twelve-year-olds, my kids are nine-years-old and eleven. But before I came here, two nights ago, when I was putting my nine-year-old to bed, I told him, "Tomorrow I am going to Georgia. You will not see me for a couple of days." He said, "Where are you going?" And I said, "I am going to yet another conference of lawyers, and I am going to talk to them." He asked, "What are you going to talk about?" I said, "I am going to talk about how lawyers behave." "Is there something wrong with the way lawyers behave?" "Well," I said, "most of them are okay but some of them aren't." "What are you going to tell them?" "I am going to tell them that you should treat each other with respect." "Doesn't everyone know that?" "Well," I said, "it is more than that—also be honest, keep your word, do your best, think about whether what you are doing is right or wrong." "Doesn't everyone know that?," he said. I said, "There is more. Do not neglect your family, do not spend all your time working." "Well doesn't everyone know that?," he asked. I said, "There is more than that. Try to make the world a better place." So he said, "Well, doesn't everyone do that? The police do that when they deal with criminals, the firefighters when they put out fires, and the teachers when they are teaching kids." I like to think that it is much more complex than all that, and I was just trying to over-simplify for the benefit of my nine-year-old, but I am not really sure it is.

That gets me to the title of my piece, which I take from an observation of Deborah's. The title of my piece is *Public Declarations of Professionalism*. Deborah's observation was about the etymology of the word "profession" and also a bit about the history. Deborah tells us that "profession" means "to make a public declaration," and it originates with the idea of noviciates professing their dedication to ideals and practices associated with a learned calling. I do not know whether our professional ideals are too much more sophisticated than my nine-year-old's. The problem may just be that we are not adhering to them. But one thing I think we do not even have anymore, if we ever did, is a collective agreement about what our professional values are. That is why everyone has been talking about the difficulty of defining professionalism and figuring out what professional values should be included. That is one of the problems with the ABA codes of civility and the creeds of professionalism, as Deborah mentioned this morning.

My proposal addresses the fact that while we do not agree on the meaning of professionalism, it is still an important concept, and one that has force for lawyers. Most of us would be quite proud to be called "highly professional" and would be unhappy to be called "unprofessional." Therefore, I think that you could still harness this notion. My proposal is in two parts. The first part is that law firms and law offices ought to articulate what their professional values are and ought to codify them in professionalism codes of their own. A law firm ought to make its professionalism code public within and outside the firm and attempt to implement that code.

I mentioned that my proposal is not original because you heard this idea last night from Martha Barnett when she talked about the Holland & Knight creed developed fifteen years ago. Holland & Knight's creed involved three words, each of which were elaborated on: character, confidence, and commitment. She discussed that the creed has been important in how the firm deals with issues such as compensation, promotion, and planning, and that it has helped the firm become an institution with values that everyone buys into and takes pride in. My suggestion is simply that every firm and every law office ought to do the same thing.

This is very different from tacking on your wall the ABA's off-the-shelf professionalism code or creed, because, as the last speaker mentioned, we are a very diverse profession, and we have diverse values. Plus, context counts. When I was in the United States Attorney's office, if we had had a professionalism creed, as essentially we did, although it was not written, it would have been two words. Those words were: "do justice." That was a principle that I have written about since and that animated everything we did in that office. That is a very different creed, I think, from what the legal aid defense lawyers would have had. I do not think their creed would have been "do justice." It is also different from the creed of Holland & Knight. Yet, simply the fact of figuring out what your own professional values are, articulating them, making them known, and trying to carry them out, would be very useful.

As Robert Nelson said, symbolic acts, and this may be a largely symbolic one, can have impact. Learning from what businesses do when they have internal codes, which are reinforced by top management, reinforces that idea. You may have noticed, those of you who have ridden the elevator in the Hilton Hotel, that there is, essentially, the Hilton Hotel's professionalism creed by the elevator door, and it is signed by all of the employees. In part that is public relations. It is telling us what the employees aspire to do, but it is also reminding them. I think that both halves of that are very important. This basically reflects the premise, as I mentioned, that there is no accepted definition of professionalism, no accepted professional values that we all agree on. Self-reflection is important. Lastly, as Robert Nelson said earlier, the problem is not the law schools and the organized bar. Anybody who listened to Art Garwin's litany of what the ABA is doing in this area cannot think that the problem is the ABA. The problem is the law firms and the law offices, and you have got to do something there. So that is the first half of my proposal: professionalism creeds.

The second half responds to the obvious criticism: "Well, how are you going to get them to do that?" Holland & Knight adopted a professionalism code, but most law firms have not done so. They presumably do not think it is in their interest. If it is not in their interest, they are not going to do it. My answer to that gets to something that Peter Joy said about judges: You need someone to lead by example. Here, I would say it is the bar leaders. All the bar leaders are talking, and I think sincerely, about the importance of professionalism. I say professionalism begins at home. Those bar leaders, everyone of them who is not in a law firm that has a professionalism creed as does Holland & Knight, ought to go to their law firm and get the firm to adopt

one. Anybody running for a leadership position in the bar ought to do the same thing. You will then have all of these people who are leading by example and igniting this movement. The person who, of course, is in the best position to begin this movement is Martha Barnett, because her firm has already done it, and she can talk with sincerity about its significance. So that is my proposal. Thanks.

RHODE: It is a mistake for conference organizers to ever be defensive, but I just want to fill in one thing about Bruce and his offer. It was not that we said, "Oh, let's talk about any new initiative." I said to Roy when we were planning this, "If Bruce has a new initiative, it is going to be worth discussing." So thank you, Bruce, for not disappointing me here. I felt my reputation was very much on the line.

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